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No.

In The Supreme Court of the United States

OCTOBER TERM, 1984

COPY-DATA SYSTEMS, INC.
AND
SYNERGISTICS, INC.,
Petitioners,

v.

TOSHIBA AMERICA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 10, 1985

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Whether the Court of Appeals adhered to the appropriate standard applicable to the review of findings of fact by a trial court, where the Court of Appeals held findings to be "clearly erroneous" by determining issues of credibility; by construing documentary evidence without regard to the construction given by the trial court, and without regard to undisputed evidence including testimony by witnesses appearing at trial which placed the documents in context; and by determining issues de novo based upon a selective view of the record without regard to the trial court's opportunity to appraise the record as a whole?

2. Since the Courts of Appeal vary substantially in their application of the standard of review articulated by this Court, what is the appropriate standard for review of findings of fact based upon determinations of credibility, undisputed evidence, and the drawing of inferences from documentary evidence which is placed in context by testimony?

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October Term, 1984

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TOSHIBA AMERICA, INC.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Order of the Court of Appeals, dated March 12, 1985, denying petitioners' timely request for rehearing, is reproduced as Appendix E hereto.

The Opinion of the Court of Appeals (Winter J.) dated February 15, 1985, setting aside various of the District Court's findings

as "clearly erroneous," is reported in 755 F.2d 293 (2d Cir. 1985) (App. A to this petition).[1] The Opinion and Order of the United States District Court for the Southern District of New York (Owen, J.), dated March 23, 1984, is reported at 582 F. Supp. 231 (S.D.N.Y. 1984) (App. B to this petition). The Findings of Fact of the District Court dated June 8, 1979, which were incorporated by reference in the District Court's 1984 Opinion, supra, are unofficially reported in 1979 Trade Cases (CCH) ¶62,696 (S.D.N.Y. 1979), and are reproduced as Appendix C hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).[2]

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[1]References to "App." are references to the appendices to this petition.

[2]In accordance with Supreme Court Rule 21.1(f), the "statutes involved" herein are set forth in Appendix G. Pursuant to Supreme Court Rule 28.1, petitioners state that Copy-Data, Inc. was an independent corporation and had no parent. Synergistics was a corporation wholly-owned by Copy-Data, Inc.

STATEMENT OF THE CASE

Plaintiff Copy-Data Systems, Inc. was established in 1968 to market copying equipment ("copiers"). Plaintiff Synergistics, Inc. was a wholly-owned subsidiary of Copy-Data formed to market copiers to dealers. Plaintiffs (petitioners) are referred to herein as "Copy-Data." Toshiba America, Inc. ("Toshiba") is the United States subsidiary of a large Japanese industrial corporation, which sold copiers directly to major United States firms which remarketed the copiers under their own trade names. In 1971, Toshiba authorized Copy-Data to introduce Toshiba copiers and the "Toshiba" name, and to establish a large Toshiba dealer organization in the Northeastern United States. Toshiba appointed Copy-Data as Toshiba's exclusive wholesale distributor in several Northeastern states. Shortly thereafter, Toshiba requested Copy-Data to establish a dealer organization in the Middle Atlantic States. Copy-Data established and trained approximately sixty (60) retail Toshiba copier dealers.

Toshiba expected Copy-Data to bear the substantial expense and risk of establishing a dealer network and providing extensive dealer service training. Toshiba also expected Copy-Data to bear the expense and risk of ex-

tending credit to dealers and for eliminating unsuccessful dealers. Copy-Data did so, accomplishing what Toshiba described as an "awesome project" (2d Cir. Joint Appendix at 749). After Copy-Data had established dealer networks for Toshiba, Toshiba highly praised Copy-Data's efforts. Toshiba's Marketing (wholesale) Manager (called as a witness at trial by Toshiba) characterized Copy-Data as "one of the most professional companies that I have been privileged to do business with," which "sold an awful lot of our equipment," and which was "extremely cooperative" and was "good pay." (2d Cir. Jt. App. at 764, 785-86; see App. B at 8.)

Once Copy-Data had established the Toshiba name, had trained Toshiba dealers in the servicing of Toshiba copiers, and had finally begun to profit from its dealer network, however, Fumio Kurose, Toshiba's newly appointed General Manager of its Business Equipment division (who had replaced the official who authorized Copy-Data to develop the Toshiba dealer network) determined to appropriate for Toshiba the result of Copy-Data's efforts. By eliminating Copy-Data's distribution and selling directly to Copy-Data's dealer organization, Kurose would eliminate the distributor margin and improve Toshiba's profitability. Thus, from 1973 to

1976, as the District Court found (App. C), Toshiba under Kurose engaged in a series of actions against Copy-Data with the purpose and effect "precisely at the point where the profit is to be reaped . . . to divert a material portion of the profit from those who have earned it to those have not." International News Service v. Associated Press, 248 U.S. 215, 239 (1918). Toshiba's actions ultimately drove Copy-Data into bankruptcy -- and provided to Toshiba the dealer network Copy-Data had established.[3]

In early 1973, Kurose obtained Copy-Data's dealer list by misrepresenting that he intended to use the list to send dealers promotional information. Toshiba later used the list to market directly to Copy-Data's dealers, after requiring Copy-Data to cease distribution in the Middle Atlantic States. (App. C at 5-6.) Beginning in November, 1973, Toshiba threatened to terminate Copy-Data's exclusive right to distribute Toshiba copiers in the Northeast and threat-

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[3]Though his decisions were central to the case, Toshiba declined to expose General Manager Kurose to live cross-examination at trial. Toshiba relied on his deposition.

ened to withhold from Copy-Data the new Toshiba BD-702 plain paper copier, unless Copy-Data surrendered to Toshiba the entire Middle Atlantic dealer network that Copy-Data had established. Copy-Data complied in March, 1974. Contrary to the District Court's findings (App C at 6) which relied on determinations of credibility and on undisputed documentary evidence, the Court of Appeals characterized Copy-Data's acquiescence in surrendering its Middle Atlantic dealer organization, without compensation, as "voluntar[y]." (App. A. at 2072.)[4]

Kurose had also decided to appropriate Copy-Data's Northeastern dealer organization. Thus, in mid-1974 Kurose told Copy-Data that Toshiba would only supply Copy-Data with a limited number of copiers sufficient to sell in New Jersey. Toshiba announced that it alone was

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[4]"Plaintiffs-Appellees' Petition for Rehearing" contains a detailed discussion of the evidence supporting the important findings of the District Court which the Court of Appeals held "clearly erroneous," reversing the District Court upon issues of credibility and ignoring undisputed testimony and documentary evidence relied on by the District Court. That petition is reprinted as Appendix F to this Petition for a Writ of Certiorari.

going to market in the Northeast. As in the Middle Atlantic States, Copy-Data was not to be permitted to continue to market to the dealers it had established. (App. C at 6-7.)

At no time prior to mid-1974 did Toshiba express concern with respect to Copy-Data's financial situation. Indeed, in late 1974, Copy-Data's regular Toshiba credit line was as high as it had ever been. (App. C. at 7.) Copy-Data furnished its fiscal year 1974 statement to Toshiba on a timely basis.[5]

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[5]The Court of Appeals' view of the case was no doubt affected by its conclusion that "plainly" Copy-Data was "deliberately withholding" its 1974 statement from Toshiba in order to conceal its financial condition. The District Court, on the basis of uncontradicted testimony by Copy-Data (App. C at 9; see 2d Cir. Jt. App. at 216, 255-56) found that Copy-Data had not withheld the statement when it provided it to Toshiba in November, 1974, although certain documents dated in August, 1974 could have suggested otherwise if they were not considered in context. The Second Circuit, accepting Toshiba's argument on appeal, seized upon these documents out of context and found the District Court's finding incorrect, which no doubt colored the Court of Appeals' other determinations, since it plainly decided that Copy-Data, not Toshiba, was the party acting improperly. However, as described in the Petition for Rehearing (App. F at 15-17), after the Second Circuit set aside the District Court's finding, and concluded that the statement was "deliberately withheld," plaintiffs

(footnote continued next page)

After receiving Copy-Data's statement, Toshiba placed Copy-Data on cash terms, though Copy-Data's other suppliers and its bank, Marine Midland, continued to provide credit. The cash terms did not cause Copy-Data the damage complained of in this suit; Copy-Data was able to purchase some $400,000 worth of Toshiba BD-702 plain paper copiers on such terms.

The BD-702, however, was inherently defective. The evidence that the copier was seriously defective included admissions by high-ranking Toshiba marketing and service

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(footnote continued)
profferred additional documentary evidence (obtained from Copy-Data's independent accountants Touche Ross by Toshiba after the liability findings were made by the District Court, during damage discovery), which conclusively demonstrated that the District Court was correct in its finding that Copy-Data had not withheld the statement. It demonstrated that the statement had not been available in August; that an August date in a cover letter referred only to the date of completion of a field audit; that, as Touche Ross testified in the deposition taken by Toshiba (but never filed by Toshiba), the August letter "almost certainly" was not sent at that time (Deposition of Louis Gershon, October 26, 1979, p. 95); and that in fact Copy-Data's independent accountants were still working on the statement in late October. The Second Circuit, however, denied rehearing and left standing its finding which is demonstrably incorrect.

representatives, testimony by independent non-party witnesses and documentary evidence (see App. F at 19-31). Nevertheless, when Copy-Data's dealers brought to Copy-Data's attention the substantial problems which the BD-702 was experiencing in the field, and Copy-Data communicated this to Toshiba, Toshiba's National Sales Manager denied that the problems were caused by the copier, and blamed them on Copy-Data's alleged poor key operator and service training. At the same time, Toshiba was aware of the fact that the problems were caused by the defects in the copier. Thus, Toshiba's wholesale Marketing Manager admitted at trial that the copiers were already being returned to Toshiba because of such defects, and were being accepted by Toshiba for modification. Documentary evidence Copy-Data submitted proved that Toshiba was accepting large numbers of BD-702s for return from others, while it refused to accept them for return from Copy-Data and refused to return to Copy-Data its purchase price. (See App. F at 20-21.)

Copy-Data representatives testified at trial that they requested to return defective BD-702 copiers to Toshiba, but that Toshiba refused to accept them. Toshiba's National Sales Manager admitted that Copy-Data complained

that the BD-702s were not working and that he told Copy-Data that the problems were due to Copy-Data's poor training. He claimed he "could not recall" whether Copy-Data asked to return the BD-702s. (See discussion, with citations, App. F at 21.) The District Court credited Copy-Data's testimony that it sought to return defective BD-702 copiers (see id.; see also App. C at 8). Nevertheless, on the basis of mis-contruing documentary evidence which the District Court properly understood, and necessarily rejecting the District Court's determination as to the credibility of witnesses appearing before it, the Second Circuit reversed this finding. (See App. A at 2071.)

Toshiba knew of Copy-Data's financial condition. Toshiba recognized that the persistent service problems caused by the BD-702 forced Copy-Data to make significant recurring expenses. Toshiba knew most importantly that Copy-Data had to accept return of the copiers from many of its dealers for credit, and that other Copy-Data dealers had refused to pay for the defective equipment. Copy-Data had to refurbish and remarket as used equipment the BD-702s returned to it and then had to repeatedly service the refurbished BD-702 copiers to keep customers from returning them. Toshiba, however,

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continued to represent that Copy-Data -- and not the defective copiers -- had caused the problems. Toshiba knew that the BD-702 problems were seriously affecting Copy-Data's cash flow, and also knew that (in contrast to its treatment of others) if it continued to refuse to accept return of the copiers and to deny Copy-Data credits, Copy-Data eventually would not survive. The District Court properly concluded that Toshiba's conduct amounted to "commercial immorality" (App. B at 20), and was designed to achieve the goal of ending Copy-Data's distribution in the Northeast (in spite of Copy-Data's exclusive appointment) so as to permit Toshiba to supply the dealers directly.

As a result of Toshiba's unfair acts, Toshiba forced Copy-Data into bankruptcy in 1976. The District Court's findings were correct, but the Second Circuit, in setting them aside, ignored its obligations as a reviewing court.

REASONS FOR GRANTING THE WRIT

The Opinion below states that the Second Circuit decided to overturn the trial court's findings of fact "largely on undisputed facts and contemporaneous documentation of unquestioned reliability." (App. A at 2066, emphasis added.) Yet the trial court based its findings of fact (App. C) on a combination of

testimony, undisputed facts, and documentary evidence. Should an appellate court be permitted under Federal Rule of Civil Procedure 52 to sort documents and undisputed facts from the evidence, ignore the witness testimony that intimately relates to them, and to draw its own conclusions (particularly as to credibility) in isolation, to overturn a trial court's findings of fact?

As Professors Wright and Miller explained at 9 C. Wright & A. Miller, Federal Practice and Procedure § 2587 (1971),

> [t]he main unsettled question in the construction of Rule 52 is whether the deference that must normally be paid to findings of the trial court applies when the finding rests on an inference drawn from undisputed facts or documentary evidence. Despite the clear language of the rule, two notes by the Advisory Committee, and pointed expressions of the Supreme Court, the authorities are indescribably confused. Even within a single circuit, decisions vacillate inexplicably from one test to another.

Id. at 740. This observation of Professors Wright and Miller was valid in 1971, and it is still valid today, especially in light of this

Court's recent opinion in Bose Corp. v. Consumers Union of U.S., ___ U.S. ___, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). In Bose, this Court considered the interaction of Rule 52 and the review standard in First Amendment cases, in which appellate courts have the obligation to "make an independent examination of the whole record." Id., 80 L.Ed.2d at 515, quoting New York Times v. Sullivan, 376 U.S. 254, 284-86 (1964). This Court in Bose granted certiorari to consider "a procedural question of first impression: ". . . whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's finding of actual malice." Id., 80 L.Ed. 2d at 511-512.

In its Opinion, however, this Court made a number of general pronouncements that the Second Circuit in Volkswagenwerk Aktiengesellschaft v. Beech Aircraft, 751 F.2d 117, 119 (2d Cir. 1984) (Winter, J.) and apparently in Copy-Data (in the opinion below also by Winter, J.) has already misconstrued. Such misconstruction has even further exascerbated the split between the circuits, and indeed within circuits, which Professors Wright and Miller observed arises from "the main unsettled question of Rule 52."

In Volkswagenwerk, supra, 751 F.2d at 119, for example, the Second Circuit believed that this Court in Bose "approved" the Second Circuit's view in Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.), cert. denied, 340 U.S. 810 (1950) -- that "the deficiencies given to findings of a district court varies with the extent to which the evidence is disputed and with the importance of credibility to the resolution of the dispute." Volkswagenwerk, supra, 731 F.2d at 119. In Orvis, the court opined that

> Where a trial judge sits without a jury the rule [of review] varies with the character of the evidence . . . where the evidence is partly oral and the balance is written or deals with undisputed facts, we may ignore the trial judge's findings and substitute our own (1) if the written evidence or some disputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence of the undisputed facts, so that his evaluation of credibility has no significance.

Orvis v. Higgins, supra, 180 F.2d at 539 (emphasis added).

Yet this Court in Bose no more approved Orvis - which represents the Second Circuit's view of proper Rule 52 review - any more than this Court approved the opposite views of the First Circuit, see Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 377 (1st Cir. 1980), the Ninth Circuit, see Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1351-52 (9th Cir. 1982); see also Lundgren v. Freeman, 307 F.2d 104, 113-15 (9th Cir. 1962), the Eighth Circuit, see Worthen Bank & Trust Co. v. Franklin Life Ins. Co., 370 F.2d 97, 99-100 (8th Cir. 1966), or perhaps even of a different view of the Second Circuit itself, see Von Clemm v. Smith, 363 F.2d 19, 22-23 (2d Cir.), cert. denied, 385 U.S. 975 (1966). Instead, this Court in Bose emphasized that it had repeatedly held that Rule 52 "means what it says." Bose, supra, 80 L.Ed.2d at 515. What Rule 52 says, this Court continued, is that first, a trial court finding is "clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, [citing] United States v. United States Gypsum Co., 333 U.S. 364, 395, 92 L.Ed

746, 68 S.Ct. 525 (1948)." Bose, supra, 80 L.Ed.2d at 516. Second, Rule 52(a) "commands that 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of witnesses . . .." Id. Third, this Court observed that under Rule 52, "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based on oral testimony . . . but the presumption has lesser force in the former situation than in the latter. Similarly, the standard does not change as the trial becomes longer and more complex, but the likelihood that the appellate court will rely on the presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just for a few hours." Id. Finally, "Rule 52(a) applies to findings of fact, including those described as 'ultimate facts' because they may determine the outcome of litigation." Id., 80 L.Ed.2d at 517.

Contrary to the Second Circuit's misconstruction of Bose, this Court did not give appellate courts free license to overlook witness testimony that supports factual findings, to isolate documentary or undisputed evidence that might also relate to those findings, and then to draw their own independent conclusions from the isolated documents and evidence and find the

trial court's findings to be clearly erroneous. Yet at the same time, in Bose this Court suggested for the first time that Rule 52's standard of review for factual findings based on documentary and undisputed evidence is less strict than for review of findings based on oral testimony. Given the split between the circuits that has existed for many years regarding the standard of review under Rule 52, where factual findings are based solely on documentary or undisputed evidence, Bose intensifies the long-standing question of the proper standard of review where factual findings are based both on documents and undisputed evidence, and on witness testimony.

Several courts of appeal have considered the question of what standard to apply. In Clark v. Universal Builders, Inc., 706 F.2d 204, 206 (7th Cir. 1983), the Seventh Circuit held that the "broader" clearly erroneous standard should apply where the reviewing court partially relied on documentary evidence or found many facts by drawing inferences from undisputed facts. In Sta-Rite Industries, Inc. v. Johnson, 453 F.2d 1192, 1194 (10th Cir. 1971), cert. denied, 406 U.S. 958 (1972) the Tenth Circuit held that it would not relax the normal "due deference" rule of review where the trial court determined factual issues by relying on testimony

together with depositions and exhibits, even though the trial court viewed the case as a close one and where it had based many of its factual findings on documentary evidence and depositions.

As this Court declared in Inwood Laboratories v. Ives Laboratories, 456 U.S. 884, 855-56 (1982), the Second Circuit erred in rejecting the district court's findings of fact simply because it would have given more weight to one piece of evidence than did the trial court. Inwood Laboratories followed this Court's opinion in United States v. Yellow Cab Co., 338 U.S. 338, 341-42 (1949), in which this Court made clear that it is improper for a Court of Appeals to hold a trial court factual finding to be clearly erroneous when the trial court has simply based its finding on one of two permissable views of the weight of evidence.

In Inwood, this Court held that Rule 52 "rests upon the unique opportunity of the trial judge to evaluate the credibility of witnesses and to weigh the evidence," which requires a Court of Appeals to show "deference" to the trial court's findings. 456 U.S. at 855. "Determining the weight and credibility of the evidence is the special province of the trier of fact." 456 U.S. at 856. This Court concluded:

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent" (citations omitted).

456 U.S. at 857-58.

Here, the Court of Appeals has done just what this Court said in Inwood Laboratories is improper. The appeals court chose between the testimony, the documents and the undisputed facts in evidence in this case and gave some documents (which it misinterpreted) and some undisputed facts more weight. Yet if anything, here, the testimony should have been given more weight, since this case was one in which the "complaining party creat[ed] a vast record of cumulative evidence [covering from 1970 through 1976] as to long-past transactions, motives and purposes, the effect of which depends largely on credibility of witnesses," United States v. Oregon State Medical Soc'y, 343 U.S. 326, 332 (1952), which, of course, Rule 52 places within the "special province" of the trial court to judge. Inwood, supra.

This Court has repeatedly declared that the "clearly erroneous" test of Rule 52(a) controls appellate court review of factual conclusions based on inferences that a trial court draws from documents and undisputed facts, U.S. v. Singer Mfg. Co., 374 U.S. 174, 194 n. 9, (1963), as well as to "factual inferences from undisputed basic facts." Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291 (1960). The Opinion below does not disagree with this in principle. See App. A at 2066. Yet, as the Opinion below indicates, the Court had no clear guidance as to how to apply the "clearly erroneous" test in its review of factual findings that the District Court drew from a combination of undisputed facts, contemporaneous documentation, and witness testimony. Thus, the Second Circuit took a "view of the facts . . . admittedly at great variance with that taken by the district court." (App. A at 2066.) Id. With such a view, the Court of Appeals departed from the standards that this Court has declared to apply to Court of Appeals' reviews of factual findings of United States District Courts under Federal Rule of Civil Procedure 52(a), where such findings were based on witness testimony. Indeed, the liberty that the Second Circuit took to consider "undisputed

facts" and "contemporaneous documentation" in this case far exceeded the liberty that this Court has ever given courts of appeal where other types of evidence have been involved.

The Second Circuit in the opinion below also decided factual issues de novo, contrary to this Court's admonition in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). It gave the facts constructions other than those that the District Court gave them, resolved ambiguities differently, found a more sinister cast to actions which the District Court apparently deemed innocent, and only then found the District Court's factual findings to be clearly erroneous, contrary to this Court's holding in Inwood, supra, and in United States v. Nat'l Ass'n of Real Estate Boards, 339 U.S. 485, 495-496 (1950). Finally, and most seriously, the Second Circuit ignored the "unique opportunity" of the District Court to judge the credibility of witnesses, Inwood, supra - and indeed, ignored most of the testimony before the District Court - in violation of the express provisions of Fed. R. Civ. P. 52(a).

The District Court made twenty-three separate findings of fact. In its appellate brief (pp. 78-87), defendant Toshiba pointed to four of these findings as "clearly erroneous"

(findings numbered 13, 17, 19 and 20, in App. C at 6-8).

First, the District Court found that Copy-Data was "coerced to withdraw" from the Middle Atlantic States (finding 13, App. C at 6), based upon witness testimony and contemporaneous documentary evidence. (See description of evidence in Appendix F at 4-8.) The Court of Appeals held the withdrawal to be "voluntary" by ignoring the evidence and reversing on no discernible basis except perhaps its own evaluation of the credibility of witnesses it had never seen. (App. A at 2072.)

Second, the District Court found, in finding 19 (App. C at 9) that Copy-Data had not received its fiscal year financial statement from its accountants, Touche Ross, and had therefore not given it to Toshiba when requested in late 1974. As described earlier, this finding was based upon Copy-Data witness testimony, which rejected the fact that the statement was available in August, 1974, notwithstanding the accountants' cover letter which had been backdated by the accountants to the time of a field audit, rather than the actual completion date of the financial statement. (See generally App. F at 14-17.) Nevertheless, the Court of Appeals set aside this finding, which colored its view and resulted in its implicit conclusion that finding

17, also, was not plausible. (App. A at 2069-70.) The Touche Ross discovery (taken by Toshiba) confirming the correctness of the District Court's earlier finding (based upon witness testimony) was offered to the Court of Appeals in plaintiffs' petition for rehearing, but was not received. The Court of Appeals reversal of the finding, as urged by Toshiba, is demonstrably incorrect.

Finally, the District Court found that Copy-Data requested to return defective BD-702 plain paper copiers to Toshiba for credit, but that Toshiba refused to accept them. (finding of fact 20, App. C at 9.) Copy-Data's testimony explained why it did not thereafter write to Toshiba concerning the return of the copiers (which Toshiba contended to Copy-Data were not defective, while Toshiba knew that the contrary was true). Copy-Data's testimony explained also the meaning of documents in which it had been permitted to return copiers damaged in "transit" (in contrast to defective copiers). See discussion, App. F at 18-26. Nevertheless, the Court of Appeals found the District Court's finding to be clearly erroneous (App. A at 2071). In effect it declared that Copy-Data's witnesses were not credible, and that Toshiba's witness, who

recalled Copy-Data's complaints that the copiers were not working, and recalled that he told Copy-Data that the problems were due to Copy-Data, but who could "not recall" whether or not Copy-Data asked to return the copiers, was credible, and his testimony proved that Copy-Data never asked to return the copiers.

Thus, the Court of Appeals usurped the province of the trial court, as defined by this Court's rulings.

Having rejected findings 13 and 20, which were the basis of Copy-Data's damages, the Court of Appeals reversed the 1984 judgment of the District Court, which had incorporated those findings by reference. (App. B.)

The question on review here is whether the Court of Appeals applied the proper standards, consistent with the decisions of this Court and Federal Rule of Civil Procedure 52, to find that the District Court's factual findings were "clearly erroneous." In particular, the question is whether the Court of Appeals correctly reviewed the findings of the District Court based on undisputed facts and documentation, and on witness testimony, when it either ignored the District Court's findings, or selected certain "undisputed facts" and docu-

mentation in isolation of witness testimony which the District Court had before it, using them as a basis for its own views about the nature of defendant Toshiba's conduct, and about the cause of plaintiff Copy-Data's financial insolvency. The need to resolve this question is even greater, in light of the Court of Appeals' preference to ignore or discredit witness testimony that the District Court judged to be credible, and instead to draw its own conclusions from isolated documents and portions of the evidence that the District Court apparently concluded were superceded by or explained by the credible testimony.

As the District Court did in this case, a trial court may often base its findings simultaneously on witness testimony, on documents, and on undisputed facts that the witness testimony helps explain or places into proper context. Yet simply because an appellate court may arguably be in as good a position as the trial court to alone determine the effect of documents and undisputed facts, that should not give an appellate court further latitude to isolate documents and certain evidence and to hold as "clearly erroneous" the factual findings which a trial court has made after it considered <u>both</u> documents and undisputed facts together with witness testimony. For just as documents may

illuminate whether a witness' testimony is credible, so also is witness testimony essential to a court's determination of the weight and meaning to give to documents.

It would do considerable violence to Federal Rule of Civil Procedure 52(a) if this Court did not act to clarify whether the gloss on Rule 52 applied by the Second Circuit in this case is indeed the law. Accordingly, this Court should grant certiorari in order to determine in this case the questions presented for review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: June 10, 1985

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 188 — August Term, 1984

(Argued: October 17, 1984 Decided: February 15, 1985)

Docket No. 84-7466

COPY-DATA SYSTEMS, INC., and SYNERGISTICS, INC.,
Plaintiffs-Appellees,

v.

TOSHIBA AMERICA, INC.,
Defendant-Appellant.

Before:

OAKES and WINTER, *Circuit Judges*, and CLARIE,* *District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Richard Owen, *Judge*), 582 F. Supp. 231 (S.D.N.Y. 1984), awarding damages for unfair competition and breach of implied covenant of good faith.

Reversed.

ROBERT G. LEVY, New York, New York (Berryl A. Speert, Allan P. Hillman, John M. Belferman, Frank, Bernstein, Conaway & Goldman, of counsel), *for Plaintiffs-Appellees.*

* The Honorable T. Emmet Clarie, Senior United States District Judge for the District of Connecticut, sitting by designation.

JOHN J. WITMEYER, New York, New York (Thomas R. Esposito, Elizabeth M. DeCristofaro, Ford, Marrin, Esposito & Witmeyer, of counsel), *for Defendant-Appellant.*

WINTER, *Circuit Judge*:

This case arises out of a dispute between a manufacturer, Toshiba America, Inc., ("Toshiba") and two wholesale distributors, Copy-Data Systems, Inc. and its wholly-owned subsidiary, Synergistics, Inc. (collectively, "Copy-Data"). Copy-Data claims, *inter alia*, that Toshiba tortiously destroyed it as a business. After a bench trial, the district court awarded Copy-Data $680,413.86 in damages and interest, an amount found to be Copy-Data's value as a going business. Noting that our consideration of this case has not been aided by the overly long and unfocused briefs submitted by the parties, we reverse.

BACKGROUND

An understanding of the reasons we reverse requires that we set out in some detail a chronological overview of the history of Copy-Data and its relationship with Toshiba. Appropriate mention will be made wherever facts are disputed.

1968

Copy-Data was incorporated by two copier salesmen in February, 1968, to market copying equipment, supplies, and service at the retail level. Initially, Copy-Data's primary line of copying equipment was Remington Rand, although it sold a number of competing brands during its corporate lifetime. Its primary marketing

area was New Jersey. Copy-Data established a fiscal year ending each June 30 for accounting purposes, and during the period between February and June, 1968, lost $3,000 on revenues of $89,000.[1]

1969

By June, 1969, Copy-Data had expanded its marketing operations into New York City and Connecticut. During the fiscal year ending June, 1969, Copy-Data incurred losses of $64,000 on revenues of $1,120,000.

1970

In January, 1970, Copy-Data raised capital of $458,000 from the sale of common stock to the public. This enabled it to pay off some debts and to have positive working capital for the first time. Nonetheless, it incurred a loss for the year ending June, 1970, of $55,000 on revenues of $1,510,000.

Copy-Data's contacts with Toshiba began in the later half of 1970 when Toshiba was considering introducing a coated paper copier into the United States market. In December, 1970, Copy-Data asked Toshiba for an appointment as the exclusive wholesale distributor of Toshiba's coated paper copiers in New Jersey, New York, and Connecticut. Prior to this time, Copy-Data had no experience in wholesaling.

1971

In February, 1971, Toshiba began importing coated paper copiers into the U.S. and appointed Copy-Data as Toshiba's exclusive wholesale distributor in New Jersey,

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[1] These and subsequent financial reporting figures from the record are rounded.

New York, Connecticut, Rhode Island, and Massachusetts, and its non-exclusive wholesale distributor in Maine, Vermont, New Hampshire, and Pennsylvania. Toshiba memorialized this appointment in an internal memorandum and letter, but a written contract was never prepared. The next month Copy-Data incorporated Synergistics, Inc. as its wholly-owned subsidiary through which all wholesale sales of Toshiba equipment were made.

In June, 1971, Copy-Data reported the first of the only two profitable years it ever had, earning $71,000 on revenues of $1,438,000. In November, Toshiba extended Copy-Data a credit line of $50,000.

1972

In March, 1972, Toshiba requested that Copy-Data sell Toshiba equipment at the wholesale level in the "Mid-Atlantic" region. The following month, Toshiba raised Copy-Data's line of credit to $60,000.

In June, Copy-Data reported its second and last profitable year, earning $68,000 on revenues of $2,463,000, and reporting $140,000 in working capital. Included in those figures were Synergistics' earnings of $54,000 on wholesale sales of $765,000, of which $555,000 represented sales of Toshiba equipment.

In September, Toshiba invited Copy-Data into the Chicago area, and in the following month again raised Copy-Data's credit line, this time to $90,000.

1973

In January, 1973, Toshiba informed Copy-Data that it did not want Copy-Data to acquire any more dealers in

the Chicago area. Three months later, Toshiba requested customer lists from all of its wholesale dealers, including Copy-Data, stating, *inter alia*, that it wanted to be able to communicate directly with its retailers about new products and price changes. Copy-Data complied with the request.

For the fiscal year ending in June, Copy-Data (including Synergistics) reported a loss of $166,000 on sales of $3,033,000. Copy-Data's working capital collapsed to $4,000. Synergistics earned a $6,000 profit on total wholesale sales of $1,173,000, of which $837,000 represented wholesale sales of Toshiba equipment.

The next month, Toshiba informed Copy-Data that it intended to market its products directly in the Chicago area, and Copy-Data's presence there was no longer welcome. At the same time, Toshiba raised Copy-Data's line of credit to $125,000.

In November, Toshiba indicated that it wanted to market its products directly to retailers in the Mid-Atlantic region. However, Toshiba took no action at this time, and Synergistics continued to market Toshiba products in that area. Also in November, Copy-Data, acknowledging the need to retrench, closed its Connecticut retail operation because of continuing losses.

1974

In January, 1974, Toshiba demonstrated a prototype of its new plain paper copier at a meeting of Copy-Data's retail distributors. For many years, only Xerox had marketed a plain paper copier in the United States. However, Xerox's patents were expiring and a number of com-

panies, including Toshiba, were introducing competing plain paper copiers. These copiers, like Xerox's, were often more expensive, more complicated, and more unreliable than coated paper copiers. Moreover, they required much more attention from both the dealer and the user. Despite these drawbacks, purchasers generally preferred machines capable of copying on plain paper to coated paper copiers.

A month later, Toshiba again requested that Copy-Data withdraw from the Mid-Atlantic region. In March, Copy-Data complied. The district court found that at the time of its withdrawal, Copy-Data was selling $25,000 of Toshiba equipment per month in that region.

In April, and again in June, Toshiba informed Copy-Data that it, Toshiba, intended at some future time to start direct marketing in the Northeast, and that it would prefer that Copy-Data confine its operations to New Jersey. Copy-Data refused to do so but offered to sell out, an offer refused by Toshiba. At the June meeting, Toshiba also demanded to see Copy-Data's financial statements for the fiscal year just ending. Copy-Data replied that the statements would be available in the near future.

Relations between Toshiba and Copy-Data deteriorated swiftly over the balance of the year. In August, Toshiba reiterated its intention to market its products in the Northeast in competition with Copy-Data and, for the first time, objected to the statement on Copy-Data's letterhead identifying itself as the "Exclusive Northeast Distributors [of] Toshiba Copiers." The next month, Toshiba's sales manager persuaded Copy-Data to buy $50,000 of coated paper copiers on the agreement that the purchase would not be charged to Copy-Data's line of

credit. In early October, the sales manager informed Copy-Data that eight new plain paper copiers had arrived, but that Copy-Data had to pay cash for them because it was past due in its bills. Copy-Data denied that it was behind, but borrowed the money from its bank and paid cash for the copiers.

In meetings in October and in November, Toshiba repeated its demand for Copy-Data's financial statements; Copy-Data claimed they were not yet available from its auditors.

In these meetings, Toshiba again took the position that Copy-Data did not have an exclusive distributorship in the Northeast and reiterated its intent to compete on the wholesale level in that area. Toshiba also asserted that Copy-Data was overdue on its account, and that fact, along with its failure to submit financial statements, made it impossible to discuss credit arrangements. At the second meeting, Copy-Data conceded that it was somewhat behind in its payments, although not in the amount claimed by Toshiba. Copy-Data offered to pay cash for any plain paper copiers available, but Toshiba refused to deliver until the credit situation was cleared up. Because the new copiers did not become available in significant quantities until January, 1975, this refusal was not of commercial significance.

Later in November, Copy-Data gave Toshiba its 1974 financial statement. Touche, Ross & Co. had dated its report on the statement August 23. Copy-Data's 10K statement was signed by its Vice President on August 28, but it was not filed with the Securities and Exchange Commission until November 7.

The financial statement (including Synergistics) showed disastrous losses. For the fiscal year ending in June, 1974, Copy-Data lost $49,000 on revenues of $3,163,000. Working capital had e porated and was now a deficit of $232,000. Synergistics' total sales were $1,218,000, including $913,000 of Toshiba equipment, but it lost $4,000. Finally, and most significantly, Copy-Data's auditors, Touche, Ross & Co., refused to express an opinion on the financial statements, because "it [was] impossible to determine the future operational activity of the Company."

After reviewing the financial statement, Toshiba stated that it was concerned about Copy-Data's financial position and requested Copy-Data's September 30th 10Q and monthly financial statements. Toshiba's accounts receivable records of November 30 indicate that Copy-Data owed Toshiba $132,000, of which $111,000 was past due. On December 9, Toshiba informed Copy-Data that it was cutting Copy-Data's line of credit to $50,000. Toshiba explained that Copy-Data had been past due in recent months, Copy-Data's financial statements indicated that it was in serious financial difficulty, and Copy-Data had not provided the further financial statements as required. Toshiba gave Copy-Data a "month or two" to bring its debts within the new line. After further negotiations, Toshiba agreed to ship 30 plain paper copiers per month, c.o.d., and Copy-Data agreed to pay off its remaining debts by the end of January. During this month, Copy-Data fired its auditors and retained another accounting firm.

In spite of the deterioration of the relationship, Copy-Data remained the sole wholesale distributor of Toshiba equipment in the Northeast throughout 1974.

1975

In January, 1975, Toshiba's plain paper copier became available in significant numbers for the first time. However, the dispute over Toshiba's desire to sell the copiers directly in the Northeast remained unresolved, Copy-Data remained on a c.o.d. basis, and on March 25, it brought the instant lawsuit. Despite the suit, Toshiba continued to supply Copy-Data with copiers and to service the machines. In February, Toshiba accepted the return of three damaged plain paper copiers, and in April, after the institution of this suit, Toshiba accepted the return of two more. These returns were accompanied by cover letters from Copy-Data. In May, Toshiba sent all dealers a form to be filled out when returning defective equipment.

Finally, in June, 1975, Toshiba hired its first salesman in the Northeast and direct sales began sometime thereafter.

For the fiscal year ending June 30, Copy-Data (including Synergistics) had a loss of $12,000 (reduced by $52,000 through an accounting change) on revenues of $2,881,000. Working capital was a negative $173,000. Synergistics earned $5,000 on its wholesale sales of $1,145,000, including $761,000 of Toshiba equipment. Copy-Data's new accountants, who dated their report in September, also refused to express an opinion on them, again because Copy-Data's future was in serious doubt.

In July, Toshiba asked its dealers to report problems with its copiers in writing monthly. Copy-Data never submitted a written report of such problems with the plain paper copiers. Indeed, in an internal memo, Copy-Data's service manager opined that the Toshiba machine

would be good for Copy-Data's dealers as "proved . . . in our own Jersey retail branch." Other Copy-Data documents indicated its view that any existing problems were caused by poor service by dealers. At trial, however, Copy-Data claimed to have formed at some point during this period the opinion that Toshiba's plain paper copier was inherently defective and to have made oral requests to Toshiba to accept the return of defective copiers, which requests were refused. It claimed that this refusal to accept for return defective copiers for which it had paid cash ultimately drove it out of business.

Also in September, perhaps to persuade its auditors that it could survive without Toshiba's business, Copy-Data stated that Toshiba was not material to its operations and that the termination of the relationship would not cause serious difficulties. In October, Copy-Data decided to discontinue wholesale operations, and it made its last significant sales of Toshiba plain paper copiers in December.

1976

The last financial statement released by Copy-Data covered the nine months from July, 1975 to March, 1976. In it, Copy-Data reported a loss of $281,000. In June, Copy-Data made a general assignment for the benefit of creditors.

PRIOR PROCEEDINGS

The case was tried before the district court sitting without a jury on a theory of a *per se* violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), based on horizontal monopolization by Toshiba in eliminating Copy-Data as a competitor. In an opinion dated June 8, 1979, the district court held that Toshiba's acts constituted a

per se violation of that Act. The district court singled out six acts by Toshiba that demonstrated an intentional plan by Toshiba to eliminate Copy-Data as a competitor: 1) the takeover of the Chicago market, 2) the demand and receipt of Copy-Data's customer list, 3) the takeover of the Mid-Atlantic market, which, the district court found, was the first act of Toshiba with a negative financial effect on Copy-Data, 4) the sale of coated paper copiers that was charged to Copy-Data's line of credit despite assurances to the contrary, 5) the elimination of Copy-Data's credit line, 6) the refusal to accept the return of defective plain paper copiers for which Copy-Data had paid cash but had sold on credit, this being in the district court's view the final nail in Copy-Data's coffin.

In November, 1981, we reversed and held that Toshiba's acts did not constitute a *per se* violation of 15 U.S.C. § 1. *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981). We held that under *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), a manufacturer's territorial restrictions imposed on its distributors were subject to the rule of reason. We noted, however, that "Copy-Data's allegations might be directed more properly to a claim of unfair competition or breach of contract." *Id.* at 411. We originally remanded with instructions to dismiss the complaint but modified the order to permit plaintiffs to pursue their state law claims.

On remand, the district court found, based on the evidence already submitted, that Toshiba had breached an implied covenant of good faith and had committed the tort of unfair competition in destroying Copy-Data. It found such a breach in the same acts upon which it had relied in finding a Sherman Act violation. *Copy-Data* v.

Toshiba America, Inc., 582 F. Supp. 231 (S.D.N.Y. 1984). The district court also relied on the previously submitted evidence in concluding that Copy-Data should be valued as of December 31, 1973, and that Copy-Data's value as of that point was $440,000. The district court added $240,000 in prejudgment interest. From that decision Toshiba appeals once more.

DISCUSSION

We deal first with the question of whether Toshiba engaged in a course of illegal conduct whether in tort or contract, which was the cause of Copy-Data's commercial demise. After detailing why we believe it did not, we turn to legal theories that might lead to a more limited recovery.

Our view of the facts is admittedly at great variance with that taken by the district court. It is nevertheless consistent with Fed. R. Civ. P. 52(a) since we are left with the "definite and firm" conviction that the district court was clearly erroneous with regard to certain key facts. *United States* v. *United State Gypsum Co.*, 333 U.S. 364, 394-95 (1948). In reaching this conclusion, we rely largely on undisputed facts and contemporaneous documentation of unquestioned reliability.

1. *The Destruction of Copy-Data's Business*

None of the events relied upon by the district court, taken separately or together, support the finding that Toshiba tortiously set out to destroy, and did destroy, Copy-Data.

We begin with an overview of the undisputed facts, which show that Toshiba's actions, whether tortious or not,

were not the cause in fact of Copy-Data's bankruptcy. The district court found that the first act of Toshiba with a negative effect on Copy-Data's financial health was Toshiba's assumption of Copy-Data's Mid-Atlantic distributors in March, 1974. Yet in June, 1973, nine months earlier, Copy-Data had negative retained earnings, working capital of only $4,000, and had just suffered a loss of $166,000 for that year. Copy Data's loss of Mid-Atlantic sales to Toshiba from April to June, 1974, amounted to only $75,000, or less than 3% of Copy-Data's total sales. (Neither the acquisition nor the loss of the Chicago and Mid-Atlantic areas was noted as a material change of business in Copy-Data's 10K statements, which at all times listed only the Northeast area as its principal area of Toshiba sales). Nevertheless, in June, 1974, Copy-Data had a working capital deficit of $232,000 and losses of $49,000. Most significantly, in June, 1974, at a time when Toshiba's actions could have had only a negligible impact, Copy-Data's auditors, Touche Ross, added a "going concern" opinion to its financial statements. A "going concern" opinion is a most serious qualification on a financial statement because it generally indicates the auditor's opinion that a company is faced with a serious risk of bankruptcy, and, therefore, that valuation of its assets as part of a going concern may be incorrect.[2]

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[2] Montgomery's *Auditing* states in part:

Going Concern. The concept that financial statements are prepared on the basis of a 'going concern' is one of the basic tenets of financial accounting (paragraphs 1022.17 and 1025.04 of AICPA Prof. Stds., vol. 3). That is the assumption that assets will 'expire' and liabilities will be liquidated in the ordinary course of continuing business activity. Because the going concern assumption is so basic, the standard auditor's report does not make reference to it.

However, when a company becomes insolvent or operates for long periods with a net outflow of cash or is unable to

[Footnote continued on following page]

Moreover, wholesale sales of Toshiba equipment never accounted for more than 30% of Copy-Data's annual revenue, and Synergistics, the subsidiary that marketed Toshiba equipment, operated either at or near the break-even point in every year save 1972. It is clear on the undisputed facts that Copy-Data's bankruptcy was not caused by its dealings with Toshiba but by its inability to earn a profit on any of its other businesses.

Putting aside for the moment Copy-Data's claims that Toshiba misappropriated Copy-Data's property in its customer lists and breached the distributorship contract—claims leading to more limited relief—we conclude that Toshiba's actions were neither tortious nor in breach of contract. The district court placed much emphasis on the following incidents: (i) Toshiba "tricked" Copy-Data into purchasing $50,000 in coated paper copiers so as to use up its credit line and render it unable to purchase the more desirable plain paper copiers; (ii) Toshiba tortiously cut Copy-Data's line of credit as part of the scheme to destroy it; and (iii) the plain paper copiers were defective and Copy-Data's refusal to accept them for return was a significant cause of its bankruptcy. We do not conceal our puzzlement at the vigor with which Copy-Data

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[Footnote continued from previous page]

> meet currently maturing obligations, the going concern assumption must be questioned. That question immediately raises a number of questions about realizable value of assets, the order of payment of liabilities, and the proper classification and carrying amounts of both; the unexpired historical carrying amounts may become inappropriate (usually they are in excess of liquidation values). Reasonable assurance that the company will not have to suspend operations—a 'going concern opinion'—must be explicitly considered, and if it cannot be reached, the auditor's report must be qualified to report that fact.

P. DeFeliese, K. Johnson, R. MacLeod, *Montgomery's Auditing* (9th ed. 1975), p. 776.

presses two such facially inconsistent claims as (i) and (iii). Taken at face value, it would seem that the "trick" prevented Copy-Data from buying unmarketable goods.

A review of the record reveals that the sale of the coated paper copiers to Copy-Data did not injure it economically, its line of credit was cut with ample legal cause, and the plain paper copiers were not wrongfully refused for return. First, the purchase of the coated paper copiers did not prevent Copy-Data from getting its initial supply of plain paper copiers, albeit with the aid of a bank loan. In addition, there is no evidence that Copy-Data lost money on the sale of the coated paper copiers. Indeed, it included in its claims of damages lost profits on the additional coated paper copiers it would have sold had it not gone out of business.

The claim about the "trick" sale of coated paper copiers is little more than an obfuscation designed to put a bad light on Toshiba's cutting of Copy-Data's credit line in the fall of 1974, an act found by the district court to be part of the plan formulated by Toshiba in 1973 to destroy Copy-Data. However, the history of the party's credit relationships absolutely belies this conclusion. Initially, Toshiba extended Copy-Data a credit line of $50,000 in November, 1971, raised it to $60,000 in April, 1972, and to $90,000 in October, 1972, and raised it again to $125,000 in July, 1973. The last increase itself undercuts Copy-Data's theory of the deliberate destruction of its business since it came after Toshiba's acquisition of the customer lists and its demand that Copy-Data leave Chicago. Increasing a line of credit to a company one is about to destroy is not plausible conduct.

Copy-Data's line of credit remained at $125,000 until at least October, 1974, the month in which the dis-

trict court found (over defendant's strong objections) that Toshiba cut it. Since Toshiba did not receive Copy-Data's financial statements until November, cutting the line of credit in October was viewed by the district court as a demonstration of Toshiba's bad faith. However, it is undisputed that Toshiba repeatedly requested Copy-Data's financial statements throughout the summer and fall of 1974, and that Touche Ross's auditor's report attached to those statements was dated August 23, 1974. The district court apparently credited testimony that the auditor's reports were always backdated. However, Harry Winston, Vice President of Copy-Data, signed the 1974 10K statement on August 28, although it was not filed with the Securities and Exchange Commission until November 7. Plainly, Copy-Data was deliberately withholding the financial statement from Toshiba in order to conceal its poor financial condition and was, at the time the line was cut, either behind in its accounts with Toshiba or on the verge of being so. Moreover, the 10K statement should have been filed with the Securities and Exchange Commission by October 1. 17 C.F.R. § 240.15d-1 (1974). Even if the credit line was cut in October, therefore, the failure to produce the 1974 financial statements by then had a significance upon which Toshiba was entitled to act.

We cannot on these facts give any weight whatsoever to the cutting of Copy-Data's line of credit as part of a tortious scheme to destroy it. Copy-Data's decision to withhold its financial data demonstrates its consciousness of their implications for its credit standing. Absent contractual provisions to the contrary, manufacturers are not required to extend credit to distributors in serious financial difficulties. *See Turntables Inc.* v. *Gestetner*, 52 A.D.2d 776, 382 N.Y.S.2d 798 (1976) (not required to continue credit after assurances demanded but not provided).

Finally, the claim that the plain paper copiers were defective and that Toshiba wrongfully refused to accept them for return, described in Copy-Data's brief as the "cornerstone" of its damage claim, is wholly implausible on this record. Toshiba's refusal is said to have occurred well after the present litigation began. However, despite the pendency of this action and the sharp deterioration of the underlying commercial relationship, despite Copy-Data's successful return with cover letters of five plain paper copiers damaged in shipment, and despite its claim that Toshiba's refusal to accept defective machines for return came at a critical moment in Copy-Data's commercial life, there is not a single document in the record reflecting a request to Toshiba to accept defective copiers for return.

The documents that are in evidence indicate that Toshiba had earlier supplied particular documentation to accompany requests to return, and requested written information on problems with the machines. Moreover, Copy-Data's own internal memoranda indicate that it regarded existing problems with the machines as dealer service problems, not inherent defects. We are thus left with oral testimony that Copy-Data sought to return defective copiers in numbers unspecified then or now, without identification then or now by serial number, and without specifying then or now the precise defect claimed for each machine.[3] This oral testimony strains credibility, but, even assuming it to be true, there is nothing wrongful in Toshiba's refusal to respond to oral requests of such generality.

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[3] The district court found only that Toshiba refused to accept "the defective machines." When it went bankrupt, Copy-Data had 20 Toshiba machines in inventory of the 200 it had purchased. No claim was made that these 20 were defective.

Upon examination, therefore, the record shows no tortious scheme by Toshiba to destroy Copy-Data.

2. *Breach of Contract and Misappropriation of the Customers Lists*

Insofar as the breach of contract claim is concerned, we begin by pointing out that the contract between Toshiba and Copy-Data was unwritten, and the parties never agreed on a time or manner of termination. Under New York law, a contract of agency with no stated duration is terminable after a reasonable duration and reasonable notice. *Colony Liquor Dist., Inc.* v. *Jack Daniel Distillery—Lem Motlow Prop., Inc.*, 22 A.D.2d 247, 254 N.Y.S.2d 547 (1964); *Noah* v. *L. Daitch & Co.*, 22 Misc.2d 649, 652, 192 N.Y.S.2d 380, 385 (1959); *Restatement (Second) of Agency* § 442 comment c (1958). The district court found that in a "narrow chronological sense," 582 F. Supp. at 236, Toshiba had provided Copy-Data with reasonable notice when it cancelled Copy-Data's distributorships in Chicago, the Mid-Atlantic and the Northeast. However, it also concluded that the "course of conduct which surrounded and led to each of these terminations was so unreasonable as to deprive Copy-Data of the opportunity to recoup its investment in the development of the Toshiba distribution network." *Id.* We disagree.

Copy-Data withdrew from the Chicago and Mid-Atlantic areas voluntarily upon a request from Toshiba. We may accept as true Copy-Data's assertion that it did so not out of a desire to give up these sales but solely to appease Toshiba so as to maintain a working relationship. However, contractual liability for excluding Copy-Data from Chicago and the Mid-Atlantic region exists,

if at all, only if Toshiba procured Copy-Data's withdrawal by concealing an intent to teminate the entire relationship and carried out that intent thereafter. Because, as the discussion in the preceding section indicates, the deterioration and ultimate disruption of that relationship was the result, rather than the cause, of Copy-Data's grave financial condition, no such liability follows. Copy-Data's failure to produce the oft-requested financial statements after the 10K was due to be filed on October 1 clearly permitted Toshiba to put it on a cash only basis, and the later evidence of financial collapse justified termination of the relationship under New York law. *Gestetner*, 52 A.D.2d at 777, 382 N.Y.S.2d at 799 (seller can suspend deliveries when it reasonably suspects buyer insolvent); *Trace X Chemical, Inc.* v. *Canadian Industries Ltd.*, 1984-2 Trade Cas. (CCH) ¶ 66,089 (8th Cir. 1984) (cutting buyer's credit when auditors do not render unqualified opinion and buyer is past due is valid business judgment); *Fromm Sales Co.* v. *Troy Sunshade Co.*, 222 Md. 229, 233-4, 159 A.2d 860, 863 (1960); N.Y. U.C.C. Law § 2-609 (McKinney 1964).

We believe similar reasoning applies to Toshiba's acquisition and use of the customer lists. We may assume *arguendo* that, if it had led Copy-Data to expend time, money and effort in creating a distribution system, Toshiba would be obligated to allow Copy-Data a reasonable opportunity to exploit the property interest in the customer lists and not to appropriate it for itself. However, we find no violation of that obligation. First, we believe Toshiba did not breach any implied covenant merely by obtaining the list. The dealers involved were not end users but firms selling or leasing Toshiba products under the Toshiba name and so advertising them-

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selves. Toshiba had a legitimate interest, absent express contractual provisions to the contrary, in knowing who these dealers were. A manufacturer in Toshiba's position may need such a list to contact retailers directly about pricing, advertising, and new products, to guard against the financial failure of its wholesale distributors, and to protect the good will of its trade name. *Johnson* v. *McKee Baking Co.*, 398 F. Supp. 201, 207 (W.D. Va. 1975) (under Virginia law, manufacturer has legitimate interest in having distributor conduct business so as to reflect favorably on manufacturer as well as distributor).

Second, the only use of these lists for purposes of direct distribution by Toshiba before June, 1975, was in the Chicago and Mid-Atlantic regions. We believe Copy-Data consented to the use of these lists in those areas by voluntarily withdrawing from them. Again, we note the possibility that use of the lists might breach an implied covenant of good faith if Toshiba thereafter wrongfully terminated the relationship. However, for reasons already stated at length, no such wrongful termination occurred.

Reversed.

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APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COPY-DATA SYSTEMS, INC. *
et al.,
*
Plaintiff
*
v. 75 Civ. 1368 (RO)
*
TOSHIBA AMERICA, INC.,
*
Defendant.
*

* * * * * * * * * * *

OWEN, District Judge

Plaintiff Copy-Data brought this action in March, 1975, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and pendent claims based on New York law for unfair competition and breach of Contract. Following a trial on liability on June 8, 1979, I made findings of fact, here incorporated by reference, on the basis of which I concluded that defendant's conduct constituted a per se violation of the Sherman Act. As plaintiff conceded in its proposed findings of fact, with the award of treble damages on the Sherman Act claim it was

unnecessary to resolve the state law claims. I therefore made no determination as to plaintiff's allegations of breach of contract and unfair competition.

Following a further trial on the issue of damages, on September 30, 1980, I made further findings also here incorporated, and awarded treble damages based on the value of Copy-Data before defendant's conduct forced it into bankruptcy.

On appeal, the Second Circuit reversed, rejecting the application of the per se rule to plaintiff's claim under the Sherman Act, but remanded for a determination as to plaintiff's claims that defendant's conduct was a violation of the New York law of contracts and unfair competition.[1] Since the action was originally tried with these claims in issue, I took no new evidence, but received additional briefing on these issues.

As observed in my opinion of June 8, 1979, Copy-Data began to establish a network of

---

[1]The Court of Appeals originally remanded with an instruction to dismiss the complaint but, after plaintiff petitioned the court to modify its order to allow it to proceed on its state law claims, the Court of Appeals modified its instruction, directing dismissal only of the Sherman Act claim.

dealers for the then unknown Toshiba line of copying machines in New England, New York and New Jersey ("the Northeast") in 1970. This involved sponsoring demonstrations, soliciting dealers, training dealers' service representatives and all other aspects of developing a Toshiba dealer network. All costs associated with this undertaking were paid by Copy-Data. In 1972, Copy-Data began to expand its Toshiba sales into the "Middle Atlantic States," consisting of Maryland, Virginia, Pennsylvania, Delaware, West Virginia and the District of Columbia. Thereafter, at Toshiba's request, Copy-Data began to develop the Chicago, Illinois market.

Approximately nine months after it began to sell Toshiba machines in Chicago, Copy-Data was advised that Toshiba would begin distributing directly in Chicago and that Copy-Data was to turn over its accounts and all information regarding the dealers Copy-Data had developed in that city. This began a pattern of coercion by which Toshiba wrested from Copy-Data its customer lists and then its customers. In early 1973, Toshiba demanded and received a list of all Copy-Data dealers on the representation that it was only to be used to keep Copy-Data's dealers apprised of new products and other

changes in the Toshiba line. Later that year, the network Copy-Data had developed for Toshiba in the mid-Atlantic states was taken over by Toshiba with threats that a refusal to cooperate would result in the termination of Copy-Data's more valuable distributorship in the northeast. Ultimately, Toshiba also attempted to take over Copy-Data's dealer network in the northeast and restrict plaintiff's sales to New Jersey, only backing away from that effort when the instant complaint was filed. The trial record was clear that throughout 1973 and 1974, Toshiba was pleased with Copy-Data's performance on its behalf. See FN 2 below.

A second area of coercive conduct, and the one which ultimately led to Copy-Data's bankruptcy, involved the unusual circumstances surrounding the marketing of Toshiba's BD-702 copier. The prospect of selling the BD-702, Toshiba's first plain-paper copier, in the Northeast was a major inducement for Copy-Data not to "rock the boat" when its Chicago and mid-Atlantic markets were taken away. However, in the fall of 1974, when Toshiba began its efforts to limit plaintiff's sales to the state of New Jersey, it also took several steps to impede Copy-Data's ability to compete effectively in its remaining territory. First, Toshiba

induced Copy-Data to purchase $50,000 worth of unneeded coated-paper copiers with the assurance that these purchases would not be charged to Copy-Data's credit line. This assurance proved false and the charges for these coated-paper copiers, purchased on the eve of the introduction of the BD-702 plain paper copier, destroyed its credit line and resulted in Copy-data having to pay for its initial order of BD-702's in advance. Thereafter, Copy-Data was required to pay cash for all BD-702 orders.

Thereafter as it became obvious that, contrary to Toshiba's wishes, Copy-Data was continuing to distribute to dealers outside New Jersey, Toshiba compounded Copy-Data's cash flow problem by refusing to accept any returns of defective BD-702's, contrary to its normal practice. This selective refusal to accept returns was intended to drive Copy-Data out of the Northeast, and thus out of business, and, in combination with the loss of many of its dealerships and its credit line, this final, discriminatory tactic did eventually force Copy-Data out of business.

Plaintiff now advances two separate theories under which defendant may be held liable for the destruction of its business - a tort theory of unfair competition, and breach of

contract. As discussed below, I find that plaintiff has sustained its claims on both theories.

I. Unfair Competition

It is clear, as I found in my original findings of fact and conclusions of law, that Toshiba's conduct toward Copy-Data "unquestionably damaged the plaintiff, making it impossible for the plaintiff to succeed financially." Damage alone is not, of course, enough to establish liability for the tort of unfair competition. Unfair competition must involve damage by some unfair or improper means. The essense of the tort is the effort by a defendant to misappropriate the fruits of another's efforts or "reap where it has not sown." International News Service v. Associated Press, 248 U.S. 315, 239 (1916).

In International News Service, the Supreme Court enjoined the priating of news, writing:

> Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who

> have earned it to those who have not . . ..,"

248 U.S. 215, 239.

Toshiba's conduct in the instant action, while accomplished by somewhat different means, fit this description of prohibited activity rather precisely.

Toshiba induced Copy-Data to undertake the rather monumental tasks of introducing its products and developing a dealer network for them in the most populous areas of the United States. Then, after what Toshiba executives acknowledged before me was a period of great effort and expense by Copy-Data, Toshiba sought to take over this dealer network. It is reasonable to assume that, had Toshiba simply informed Copy-Data, in early 1973, that it desired to take over all Copy-Data's distributorships, Copy-Data would not have given them up, along with its dealer evaluations and records of acknowledged value, without considerable compensation. By pursuing a more devious route, Toshiba was able to misappropriate this work product for no consideration whatsoever.

Toshiba now urges that its course of conduct towards Copy-Data was a reasonable response to concerns about Copy-Data's performance, based on "neutral" business decisions, and that

it cannot therefore be held liable for its actions. The record clearly undercuts this alleged urgent concern, and I did not and do not credit defendant's tortured explanations of its behavior.[2] I find that Toshiba's conduct was motivated by a desire to appropriate Copy-Data's

---

[2]One of the most flawed aspects of Toshiba's explanation of its action is its insistence that Copy-Data's poor performance and financial condition was the basis for its termination in the middle Atlantic states and Chicago. This assertion seems to ignore the fact that Toshiba did not obtain the financial data to which it points in justification of these 1973 decisions until 1974. Furthermore, the allegations about Toshiba's concern with performance is made in spite of significant testimony, both in deposition and at trial, along the lines of that by Toshiba's national sales manager:

> I would say that Copy-Data is one of the most professional companies that I've been privileged to do business with . . ..
>
> They sold an awful lot of our equipment. To the best of my knowledge, they did not involve Toshiba over the years they did business with us in any legal matters, in any major customer complaints. They were a good company. (Johnston dep., p. 186).

network, to avoid paying for the development of that network and, in order to accomplish the final stage of this scheme, to drive Copy-Data out of business.

The law of New York, particularly sensitive to fairness in commercial dealings because of its central place in the regulation of the nation's commerce, has long prohibited the kind of commercial immorality in which defendant has engaged.

> The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer.

Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 101 N.Y.S.2d 483, 492; aff'd, 107 N.Y.S.2d (Sup. Ct. 1950).

Contrary to Toshiba's assertions, manufacturers which operate through distributors, such as Copy-Data, are not immune from the prohibitions of this area of tort law. The special,

confidential nature of relationships between manufacturers and distributors has often been scrutinized for just the sort of immoral and unreasonable behavior which I find in the instant action. A.S. Rappell, Inc. v. Hyster Company, 165 N.Y.S.2d 475 (Ct. App. 1957) involved a similar case of malicious destruction by a manufacturer of a distributor's business. In Walley v. Saks, 41 N.Y.S.2d 739 (Sup. Ct. 1943) the plaintiff was a purchasing agent who built a customer list for defendant's products over seven years, and was then informed that defendant was terminating his account and going after his customers. The Appellate Division condemned this conduct, clearly analogous to that of Tochiba in the instant action, writing that:

> Defendant should not be permitted to take advantage of the knowledge it acquired of the names of plaintiff's customers at the expense of the plaintiff, where it would not have obtained those names without having entered into the arrangement for the opening of plaintiff's charge account.
>
> * * * *
>
> This case involves a species of unfair competition.

> As pointed out by the trial justice, plaintiff has at considerable expense built up a certain good will. Defendant by its action seeks to destroy it. Without compensation to the plaintiff, it believes it has the right to appropriate to its own use the name of plaintiff's customers. That is not fair, just, or ethical.

41 N.Y.S.2d at 443.

On the overwhelming evidence in the record before me, and the clear prohibitions of the law of New York discussed above, I find that plaintiff has established its right to recover for the tortious destruction of its business.

II. Breach of Contract

Copy-Data's contracts with Toshiba for its exclusive distributorship in certain states and non-exclusive distribution rights in other states were terminable at will.[3] Inherent in

---

[3]Copy-Data acknowledges that its agreements to distribute Toshiba products in the three relevant areas were oral. The initial agreement regarding the northeast was confirmed by a letter of appointment in 1971. Defendant asserts that any claim for breach of contract is barred by the statute of frauds. Such a defense is clearly not available where, as here, a plaintiff was induced by oral agreements to alter its position

(footnote continued next page)

every such "at will" contract is a requirement that it be for a reasonable period and that reasonable notice be given before termination. In contracts between manufacturers and distributors, this requirement has frequently been held to provide for the opportunity to recover investments made to promote the products of another:

> A similar result has been reached though the dealer is a buyer-distributor rather than a technical agent, where in addition to undertaking to pay for the manufacturer's products as ordered, he promises to establish or maintain adequate sales and demonstration facilities or to provide a maintenance and repair service for handling said products. Thus, where substantial sums of money were expended "in developing a distributorship system" throughout a certain territory, it was held that the distributor was entitled to retain his franchise "for such a period of time as would enable it to recoup expenditures incurred in reliance upon the agreement."

(Footnote Continued)
to its detriment and to defendant's advantage. Gem Corrugated Box Corp. v. National Kraft Container Corp., 427 F.2d 499 (2d Cir. 1970).

9 Williston on Contracts, § 1017A(3) at 152 (3d. ed. 1967) (citations omitted); see Jack's Cookie Co. v. A.A. Brooks, 327 F.2d 935 (4th Cir. 1955), cert. denied, 351 U.S. 908 (1956).

Here, Copy-Data expended its energy and resources to develop a network of Toshiba distributors in the northeast, then in the mid-Atlantic states, and finally in Chicago. It was never able to recover the profits reasonably expected from its dealings with Toshiba in any of these areas and was ultimately driven out of business, and thus deprived of any future profits, by Toshiba's actions. What constitutes a reasonable duration and reasonable notice is, of course, dependent on the facts and circumstances of each case. I find that, while in a narrow chronological sense, Toshiba's notice that Copy-Data was to withdraw from these various areas was reasonable, the course of conduct which surrounded and led to each of these terminations, was so unreasonable as to deprive Copy-Data of the opportunity to recoup its investment in the development of the Toshiba distribution network.

Another aspect of all contractural relationships is the duty of good faith dealing. While Toshiba was under no duty to continue to utilize Copy-Data as a distributor,

it was obligated to conduct its dealings with Copy-Data as to this and other matters in good faith. Zimmer v. Wells Management Corp., 348 F. Supp. 540 (S.D.N.Y. 1972); see also Beidler & Bookmeyer v. Univ. Ins. Co., 134 F.2d 828 (CA2 1943). This requirement of good faith dealing was clearly not met in this case. I therefore find that Toshiba is liable for damages due to its breach of the requirements of good faith dealing and of a reasonable opportunity for a distributor such as Copy-Data to recoup its investments.

III. Damages

The damages recoverable for defendant's breaches of its contractural duties discussed above are subsumed within the damages for the tortious destruction of Copy-Data's business. It is therefore unnecessary for me to inquire further into the extent of the contract damages in this matter. This is a case which, while involving certain breaches of contractural duties, is most appropriately actionable in tort. As stated in the leading New York case on this sort of malicious business dealing:

> . . . a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven

> into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

Rich v. New York Central & Hudson River Railway Co., 87 N.Y. 382 (Ct. App. 1882).

Defendant's liability in tort in appropriately measured by the full extent of the injury it caused plaintiff. As I found in my earlier opinion on damages, it is more likely than not that absent the defendant's tortious conduct, plaintiff would have survived its financial difficulties and become profitable. Thus, defendant's conduct was the direct casual factor in plaintiff's demise and bankruptcy. It is therefore appropriate that plaintiff be compensated for the full value of its enterprise at the point when defendant, by its wrongful conduct, commenced the destruction of its value. 13 N.Y. Jur. Damages, § 61 at p. 512. To the extent there is uncertainty as to the precise amount of loss brought about by defendant's conduct, defendant must "bear the risk of the uncertainty which his own wrong has created."

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

For the reasons set forth in my September 30, 1980 damages opinion, I therefore award plaintiff $440,000 as the reasonable value of its business before it was destroyed by defendant's tortious conduct.

So ordered.

Dated: March 23, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY-DATA SYSTEMS, INC. *
et al.,
*
Plaintiffs,
*
v. 75 Civ. 1368
*
TOSHIBA AMERICA, INC.,
*
Defendant.
*
* * * * * * * * * * *

OWEN, District Judge

This is an action in which a distributor of copying machines alleges antitrust violations by the manufacturer, Toshiba, which also sold at wholesale in competition with plaintiffs.[1] The antitrust issues were tried before me from November 27 through December 4, 1978, leaving further proceedings as to damages to abide the event.

While one receives from the conflicting evidence in this case an awareness that the

executives of plaintiff were not the most skilled corporate managers, and that the corporate financial picture was from time to time a matter of serious concern, and while it is urged by defendant that it was this lack of management skills that was the sole cause of plaintiff's ultimate demise, it is sufficiently clear by a fair preponderance of the credible evidence that the defendant knowingly engaged in conduct toward the plaintiff clearly violative of the antitrust laws and that this conduct unquestionably damaged the plaintiff, making it impossible for the plaintiff to succeed financially, whether or not over the long run, absent this conduct, plaintiff would have failed in any event. In the light of the foregoing overview, I make the following findings of fact:

1. Plaintiff Copy-Data Systems, Inc. is a corporation incorporated under the laws of the State of New Jersey and, at the time of filing of this lawsuit, had its principal place of business in Fairlawn, New Jersey.

2. Plaintiff Synergistics, Inc. is a corporation incorporated under the laws of the State of New Jersey and, at the time of filing of this lawsuit, had its principal place of business at Fairlawn, New Jersey. Synergistics is a wholly-owned subsidiary of plaintiff Copy-

Data. Synergistics was exclusively responsible for wholesale sales of Toshiba copying equipment to dealers.

3. Defendant Toshiba America, Inc. is a corporation incorporated under the laws of the State of New York and has its principal place of business at 280 Park Avenue, New York, New York. Toshiba is the wholly-owned subsidiary of Toshiba Corporation, formerly Tokyo Shibaura Electric Co. Ltd., one of the largest corporations in Japan. Toshiba markets office copying equipment, parts and supplies in the United States under the brand name "Toshiba."

4. Jurisdiction of the Court is based upon Sections 4 and 15 of the Clayton Antitrust Act, 15 U.S.C. 15 & 26, and diversity of citizenship pursuant to 28 U.S.C. 1332.

5. In 1968 Copy-Data became a retail dealer in Remington Rand copying equipment. In 1970, having been impressed by the Toshiba coated paper copier at a West German trade fair, Copy-Data's officers, upon returning to New York, negotiated for Copy-Data an exclusive distributorship of Toshiba copying machines for the States of New York, New Jersey, Connecticut, Rhode Island and Massachusetts, and received a non-exclusive right to market in the States of Main, New Hampshire, and Vermont.

6. Copy-Data undertook to establish the Toshiba name throughout the Northeast where, prior thereto, Toshiba copying equipment was unknown. It identified potential dealers and solicited them by holding public showings of the equipment, private showings and demonstrations. It provided its new dealers with training at its headquarters in Fairlawn, New Jersey. This training was at no cost to the dealer; rather it was paid for entirely by Copy-Data.

7. Copy-Data also began to receive many "leads" from Toshiba for possible sales in the Middle Atlantic States and, after discussion between Copy-Data's officers and Toshiba's marketing manager, Copy-Data was made the exclusive distributor for Toshiba in the Middle Atlantic States, consisting of Maryland, Virginia, Pennsylvania, Delaware, West Virginia and the District of Columbia. Copy-Data thereafter proceeded to develop dealers in those States.

8. Thereafter Toshiba requested that Copy-Data develop the Chicago, Illinois market on its behalf, which Copy-Data did by selling copying equipment to two dealers in Chicago.

9. Shortly after this, however, Copy-Data was informed that Toshiba was going to sell directly in Chicago, and Copy-Data should turn over all of its dealer information to Toshiba.

Copy-Data did as instructed so as not to offend Toshiba.

10. In early 1973 Toshiba asked for a list of Copy-Data's dealers; Copy-Data did not wish to furnish this, but eventually did so reluctantly upon the representation that it would only be used so that Toshiba could keep Copy-Data's dealers "apprised of new products, new marketing techniques and price changes."

11. While Toshiba's marketing manager expressed pleasure with Copy-Data's service in the Middle Atlantic States, in November 1973, he set up a meeting with Copy-Data's officers and advised them that Toshiba's management would thereafter be selling directly to dealers in the Middle Atlantic States and Copy-Data was to give up the area. Copy-Data was told that the marketing manager's superior, one Fumio Kurose, said that Toshiba did not want competition in the Middle Atlantic States and that if Copy-Data did not get out it would jeopardize its exclusive distributorship in the Northeast. As an inducement, the marketing manager held out the prospect of a forthcoming new model which would copy on plain paper -- the B.D. 702 model -- which all expected to be a great success.

12. After some agonizing, since Copy-Data had put a lot of time, effort and money

into building dealers in the Middle Atlantic States, Copy-Data decided, faced with the threat of loss of the Northeast territory, to relinquish the Middle Atlantic States.

13. Copy-Data turned over its Middle Atlantic records to Toshiba in March 1974. In early 1974 Copy-Data's sales were running some $20,000-$25,000 per month, and except for some sales to dealers in the Northeast which had outlets in the Middle Atlantic States, its sales in the area ended. This coerced withdrawal of Copy-Data from competition with Toshiba in the Middle Atlantic States caused damage to Copy-Data in lost sales and income.

14. In April of 1974, Toshiba's marketing manager next let it be known to Copy-Data's officers that Toshiba planned at a later time to remove Copy-Data from competition in the Northeast area and that Toshiba's plan included later removal of its Southeastern distributor "ADBE" (Atlanta Dictating & Business Equipment Company).

15. Two months thereafter, Mr. Kurose announced to Copy-Data's officers that Toshiba had decided to limit Copy-Data's supplies to the number of machines that would satisfy the demand for the State of New Jersey alone. At this time, Copy-Data was current in its payments to

Toshiba and had a credit limit of $125,000 with 30/60 or 30/60/90 days terms.

16. Two months later in August 1974, Toshiba announced that it was going to market in the Northeast and told Copy-Data it was not authorized to use stationery bearing the legend, "Exclusive Northeast Distributors, Toshiba Copiers."

17. The following month, in September, the marketing manager of Toshiba persuaded Copy-Data to take some unneeded equipment, which it did, on the representation that this would not be charged to its credit line. This representation was either false when made or shortly dishonored since soon thereafter, when Copy-Data sought to purchase 8 B.D.-702's, it was told its credit was reduced and the new machines had to be paid for by certified check in advance.

18. In October 1974 Toshiba told Copy-Data its future contract would give it a "primary area of responsibility" only for the State of New Jersey. This was followed by a letter from Toshiba which, as between its original draft and its final form, is clearly evidence of Toshiba's desire to prevent Copy-Data from competing with it outside of New Jersey.[2]

19. In November of 1974 Toshiba requested Copy-Data's financial statement for the year ended June 30, 1974, but it had not yet been received from its accountants. At that meeting, Toshiba informed Copy-Data it would have to pay its credit line down to $50,000, and subsequently Copy-Data was informed that in order to obtain the plain paper copier, it must pay down its entire credit line. Copy-Data continued to pay Toshiba cash for equipment.

20. Copy-Data thereafter received plain paper copiers, paying in advance, but within a few months dealers began to return the copiers to Copy-Data because of serious problems which developed with the machine. Copy-Data was forced to take the machines back and to give its dealers credit for, or exchange, the machines. Copy-Data sought to return the defective machines to Toshiba, but Toshiba refused to accept them, although it is the practice in the copying industry to do so and Toshiba, in fact, accepted returns from other distributors and dealers. This was necessarily damaging to Copy-Data's cash position.[3]

21. From the foregoing, it is obvious that Toshiba sought to eliminate competition between itself and Copy-Data in Chicago and the Middle Atlantic States and coerced Copy-Data

from marketing in those areas. It similarly sought to eliminate competition between itself and Copy-Data in the Northeast and eventually effected that desire by its varied tactics which forced Copy-Data into bankruptcy.

22. Finally, with its credit line cancelled at Toshiba, its credit line with Marine Midland withdrawn after Copy-Data's dealers began to return large numbers of 702's, Copy-Data, being unable to maintain a positive cash flow, was forced on June 7, 1976 to make an assignment for the benefit of creditors, and on June 29, 1976 involuntary bankruptcy proceedings were filed.[4]

23. I find that the plaintiff was damaged by all the foregoing conduct on the part of Toshiba and leave to proceedings which shall follow the exact determination thereof.

Given the foregoing, I reach the following conclusions of law:

A. The conduct of Toshiba constitutes per se violations of the Sherman Act, 15 U.S.C. 1. Interphoto Corporation v. Minolta Corporation, 295 F. Supp. 711, 721-23 (S.D.N.Y. 1969), affirmed 417 F.2d 621 (2d Cir. 1969).

B. Those violations have injured plaintiff in their business and property.

C. Plaintiffs are entitled to treble damages and reasonable attorneys' fees and costs of this suit.

The parties are requested to appear before the Court on Friday, June 29, 1979, at 10:30 a.m. in Courtroom 501, to discuss scheduling of further proceedings herein.

So Ordered.

June 8, 1979

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[1]My analysis of the law, which I adhere to, is set forth at pp. 514-63 of the transcript, and particularly pp. 557-63.

[2]In this connection, the Court is unable to credit the testimony of Sidney Reisch that he had no awareness of this letter with all of its obvious antitrust implications. I conclude from Mr. Reisch's inability to recall any of the circumstances that Mr. Kurose was aware of the antitrust implications in the letter and discussed them with him as is apparent from his changing the original draft of the letter from:

> We would again like to caution you not to enter into any great deal of expense in training dealers on the BD-702. This is expecially important in any area outside of the state of New Jersey.

to this:

> We would again like to caution you not to enter into any expenses in training dealers on the BD-702 in the expectation of receiving any reimbursement from Toshiba for this training.

This change is significant because over the years Toshiba had never paid for this training and therefore Kurose had no reason to say that except to change the antitrust implications of the first draft which had been prepared by the marketing manager.

[3]I note that further evidence of Toshiba's intentions toward Copy-Data is provided by the difference in treatment as between Copy-Data and the Toshiba distributor for the Southeast, ADBE. Toshiba continued to give ADBE special credit arrangements although it was in debt to Toshiba in the neighborhood of $500,000 and was slow in paying. Copy-Data, on the other hand, had its credit line extinguished and was required to pay cash in advance and was discriminated against in the return of machines.

[4]I find Toshiba's conduct even in bankruptcy court highly questionable, but I am unable to conclude to the required degree of certainty that it was motivated by the desire to prevent the assertion of this suit, which was clearly the major asset of the bankrupt.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the _____ fifteenth _____ day of February one thousand nine hundred and eighty-five.

Present:

Hon. James L. Oakes
Hon. Ralph K. Winter, Circuit Judges
Hon. T. Emmet Clarie, District Judge*

COPY-DATA SYSTEMS, INC. and SYNERGISTICS, INC.	*	
Plaintiffs-Appellees,	*	
v.	*	84-7466
TOSHIBA AMERICA, INC.,	*	
Defendant-Appellant.	*	

Appeal from the United States District Court for the Southern District of New York.

*The Hon. T. Emmet Clarie, Senior United States District Judge for the District of Connecticut, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this Court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of March one thousand nine hundred and eighty-five.

Present: Hon. James J. Oakes
Hon. Ralph K. Winter, Circuit Judges
Hon. T. Emmet Clarie,* District Judge

COPY-DATA SYSTEMS, INC., and SYNERGISTICS, INC.,	*
Plaintiffs-Appellees,	*
v.	*No. 84-7466
TOSHIBA AMERICA, INC.,	*
Defendant-Appellant.	*

A petition for a rehearing having been filed herein by plaintiffs-appellees, Copy Data Systems, Inc. and Synergistics, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

ELAINE B. GOLDSMITH
Clerk

* Honorable T. Emmet Claire, Senior United States District Judge for the District of Connecticut, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COPY-DATA SYSTEMS, INC.

AND

SYNERGISTICS, INC.,

Plaintiffs-Appellees,

v.

TOSHIBA AMERICA, INC.,

Defendant-Appellant.

DOCKET NO. 84-7466

Appeal from the United States District Court for
The Southern District of New York

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

Robert G. Levy
Berryl A. Speert
Allan P. Hillman

Frank, Bernstein,
Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

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Van Alen v. Dominick & Dominick, Inc., 560 F.2d 547 (2d Cir. 1977). 1

Rules

Rule 40 of the Federal Rules of Appellate Procedure. 1

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

I. Issues Presented and Summary of Grounds for Rehearing.

Pursuant to Federal Rule of Appellate Procedure 40, Copy-Data Systems, et al. ("Copy-Data") seeks reconsideration of this Court's February 15, 1985 judgment. The case turns upon Toshiba's intentional conduct relating to the termination of its relationship with Copy-Data. Findings of the District Court, which this Court found "clearly erroneous," logically followed from undisputed evidence and contemporaneous documents. These findings, moreover, were independently supported by the District Court's assessment of the credibility of witnesses.* This Court's holding that the District Court's findings upon the dispositive issues in this case were "clearly erroneous" is mistaken for the reasons set forth below. Of significant importance is the fact that this Court was unquestionably misled by Toshiba on an issue which the Court found critical and which

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* Evaluation of issues of credibility (particularly, as here, those relating to issues of "good faith") are especially within the province of the District Court. Van Alen v. Dominick & Dominick, Inc., 560 F.2d 547, 551 (2d Cir. 1977) (Oakes, J).

related directly to the credibility of the District Court's findings and the testimony offered by Copy-Data's key witnesses at trial. Toshiba's success in misleading this Court has resulted in an Opinion which makes the District Court appear "irrational" and Copy-Data's principal witnesses appear as "liars" whose testimony is generally not worthy of belief. Although this important issue is discussed at pages 8-9 in the chronological review of evidence, this Court may wish to consider it first in view of its affect upon this Court's entire Opinion.*

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* In its February 15, 1985 Opinion (Slip Op., p. 2), this Court stated that the parties had filed "long and unfocussed briefs". Plaintiffs regret this fact, noting however that Toshiba's 88 page brief advanced scores of separate arguments. Toshiba's brief had thirty-one sections and subsections in the "Argument" portion alone, raised eleven principal issues and dozens of others, challenged every major finding by the District Court, and accused the District Court of "badly twisting the facts of record" and of being "irrational". (Toshiba Br., pp. i-ii, 8, 10.) This petition focuses precisely upon the issues this Court found significant.

II. A Chronological Review of the Evidence (Including Evidence of Credibility) Relating to the Middle Atlantic Termination and the Destruction of Copy-Data's Business in the Northeast Demonstrates that the District Court's Findings Should be Affirmed

In early 1973, Copy-Data had been asked orally to furnish Fumio Kurose, General Manager of Toshiba, a list of its dealers; it refused, sus- pecting that Toshiba wanted the list in order to sell directly to Copy-Data's dealers. (A. 155-56.) In order to secure the list, Kurose wrote to Copy-Data on April 25, 1973, to "reiterate the reasons for this request":

> We at T.A.I. believe that our goal can be better achieved if, from time to time, we were in direct communication with our dealers in order to keep them appraised of new products [the next new product was the BD-702], new marketing techniques, and price changes. (E. 398-99; emphasis added.)

Despite its concern, on May 23, 1973 Copy-Data provided Kurose with its dealer list and confirmed by covering letter that the list was only to be used "to strengthen the line of communication between our dealers and Toshiba of America." This was sent when Kurose had already undoubtedly determined that Toshiba would

shortly commence distribution in the Middle Atlantic States. (E. 400.)*

In late 1973, at Kurose's insistence, Russell Johnston, Toshiba's National Marketing Manager, advised Copy-Data to withdraw from distribution in the Middle Atlantic States. Copy-Data subsequently complied, and Toshiba commenced sales directly to Copy-Data's dealers in the region with but one employee, Tony Consoli. (A. 139-143, 144, 246-247, 445-47, 506.) This Court determined that Copy-Data withdrew from the Middle Atlantic States

> voluntarily upon the request from Toshiba. We may accept as true Copy-Data's assertion that it did so not out of a desire to give up these sales but solely to appease Toshiba so as to maintain a working relationship. However, contractual liability for excluding Copy-Data from Chicago and the Mid-Atlantic region exists, if at all, only if Toshiba procured Copy-Data's withdrawal by

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* If Copy-Data's dealers could be easily identified by referring to the Yellow Pages, as Toshiba contends (Toshiba Br. p. 33n), why did Kurose continue to insist that Copy-Data furnish the list, and why did Copy-Data initially refuse to supply the list if its dealers could so easily be identified by Toshiba?

> concealing an intent to terminate the entire relationship and carried out that intent thereafter.

(Slip Op. 19; emphasis added; see Slip Op. p. 21.)

The credible evidence demonstrates that Copy-Data's cessation of sales to its dealers in the Middle Atlantic States was not voluntary. The evidence, discussed infra, further indicates that Kurose intended to terminate Copy-Data's Northeast distribution at the time he instructed Johnston to obtain Copy-Data's withdrawal from the Middle Atlantic States.

Copy-Data's resistance in 1973 in disclosing is customer list is hardly the behavior of a firm which is planning to withdraw voluntarily from a marketing area. Copy-Data's apprehensions were justified, since within a matter of months after he had received the dealer list, Kurose instructed Johnston to ask Copy-Data to relinquish its distribution of Toshiba copiers in the Middle Atlantic States. (A. 139-43, 246-47, 445-47.)

In February, 1974 after Toshiba had demanded Copy-Data's withdrawal, Barry Gordon, Copy-Data's Wholesale Sales Manager, wrote to one Copy-Data dealer: "Its disturbing to me that we have to surrender your business, at a point when our relationship is so good." (E.

413.) The letter goes on to state that "Al, I still believe Copy Data can be of service to your company on both toner and paper" (E. 413.) Again, this contemporaneous document hardly expresses the attitude of a firm that is voluntarily withdrawing from a market. Further, Johnston, Toshiba's trial witness, testified concerning Gordon's request to complete an order received from Copy-Data's dealer RTR (also identified to Kurose on the customer list submitted by Copy-Data on May 23, 1973 for the sole purpose of strengthening "the line of communication between our dealers and Toshiba of America"). (E. 400-01, emphasis added.) Johnston testified that Gordon was concerned that there would be "repercussions" if Copy-Data completed a sale which it had made to RTR before it agreed to withdraw from the Middle Atlantic States:

> Mr. Gordon asked me what was he to do. My comment to him was, first, I cannot, my understanding of the law couldn't restrain you. Secondly, you had an open purchase order that you had extended a price based on quantity volume. Most assuredly you sell those machines to RTR. He asked me would there be any repercussions, I said there can be none. (A. 715-16; emphasis added.)

Why would Gordon be concerned about "repercussions" if Copy-Data were voluntarily withdrawing? Indeed, Snyder, the owner of RTR, testified that Consoli, the Toshiba representative who was to handle all of Copy-Data's former dealers, "told us we would now buy equipment directly from Toshiba, and that we weren't to buy equipment from Copy-Data any more." (A. 597.)

Copy-Data principals Alan Howard and Harry Winston, like Gordon, all testified that Copy-Data's withdrawal from the Middle Atlantic States was not voluntary. (Plaintiffs' Br., pp. 20-22; A. 139-43, 246-47; 445-47; see FF 11-12, A. 1213-14). On the basis of all of the evidence, the District Court properly found (F.F. 13, A. 1214) that the withdrawal from the Middle Atlantic States, a region accounting for $25,000 per month in Copy-Data's sales (A. 230-31, 251, 330), was not voluntary.

As this Court observed, supra, liability would follow "if Toshiba procured Copy-Data's withdrawal by concealing an intent to terminate the entire relationship and carried out that intent thereafter." (Slip Op., p. 19.) We request the Court to reconsider the following sequence of events

which bear upon Kurose's intent concerning the "entire relationship."

In June, 1974, within a few months of Copy-Data's withdrawal from the Middle Atlantic States, and only four months prior to the initial projected availability of the new BD-702 plain paper copier in late 1974, Kurose called Winston to a meeting in his office in New York. He informed Winston that he wanted Copy-Data to distribute in New Jersey only and that Toshiba would make available 7 or 8 copiers per month as Copy-Data's allocation. The practical effect of Kurose's proposal, as he knew, would be to end Copy-Data's distribution in the Northeast and make available to Toshiba most of Copy-Data's remaining dealer base previously identified to Kurose in the customer list. At this time, it is undisputed that Copy-Data was current on all of its payments and had a credit line of $125,000 with Toshiba. (A. 144-47, 449-51, 764.) Its fiscal year ended on June 30 of the month that the meeting with Kurose took place. It was at this time that Winston told Kurose that if Toshiba was also going to take over Copy-Data's dealers in the Northeast, Toshiba

would have to pay for them (A. 450-51).* Kurose later maintained that he had no evidence that Copy-Data was ever given an "exclusive" distributorship for the Northeast (A. 839, 845, 847) even though the internal files of Toshiba reflected the contrary (E. 386), as the District Court found (FF 5, A. 1212) and this Court affirmed (Slip Op., p. 3).

In September, 1974, Kurose told Johnston to offer Winston $50,000 worth of coated paper copiers (copiers which were rapidly becoming obsolete) and to indicate that this purchase would be considered apart from

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* Winston had not come to Kurose's office for the purpose of asking Toshiba to buy the business Copy-Data had established with its dealers in the Northeast; it was only after Kurose indicated that he wanted Copy-Data to confine its sales to New Jersey that Winston indicated that he would not withdraw voluntarily and that if Toshiba wanted to supply Copy-Data's customers, it would have to compensate Copy-Data for the Toshiba business Copy-Data had established in the Northeast. The record makes it amply clear that Copy-Data wished to continue to market in the Northeast and was not interested in relinquishing its Northeast business to Toshiba. (A. 450-51.)

Copy-Data's credit line of $125,000.* It is significant that Kurose had claimed concern about Copy-Data's financial position since the fall of 1973 and that he had not been furnished with the current financial statement as of September, 1974, when he instructed Johnston to ask Copy-Data to take $50,000 of unneeded equipment as a "favor." (A. 150-52, 452-53, 761-64.) Toshiba had many creditworthy customers to whom $50,000 worth of coated paper copiers could be sold. Kurose did not have to ask Copy-Data for a "favor" at a time when he was vitally concerned about its ability to pay. Johnston, Toshiba's witness, testified on cross-examination at trial that Winston told him

* It is informative to consider the financial results of the Savin Corporation, which distributed coated paper copiers until the introduction of its small plain paper copier in 1974. Savin's supplier of small plain paper copiers, which it marketed as "Savin" copiers, was Ricoh of Japan. Savin's net income for the years 1970-72 totalled $5.9 million, but in 1973 Savin experienced a $5.9 million loss marketing coated paper copiers. In 1974, with the distribution of the new Ricoh small, plain paper copier, Savin made a profit again, and its net income for 1974-78 totalled $73.4 million (PX 108, admitted at trial but not in Appendix). We do not seek to compare Copy-Data to Savin; we simply point to the fact that the coated paper copier had become obsolete by 1974 and that success in the marketplace depended upon the availability of a reliable plain paper copier.

that he "didn't really need [the copiers]" and "wanted to keep his credit line as open as possible." Johnston said that Toshiba was prepared to "establish special terms and conditions if [Winston] took the machines," setting the purchase "aside from his normal credit line" so Winston could "keep it available for the plain paper copiers." (A. 761-63.) Johnston testified further:

> Q. Did Kurose know about this deal?
>
> A. I am sure that he did. He leaned on me to get numbers. He was my superior and I am sure, yes, we did have discussions. I was not privileged nor authorized to extend credit terms. (A. 763; emphasis added.)

In October, 1974, before receiving Copy-Data's financial statement, Kurose reiterated to Winston that Copy-Data should confine its sales to the State of New Jersey and offered Copy-Data a written contract with only a primary area of responsibility in New Jersey, and stated that Copy-Data would receive only eight plain paper copiers per month. Winston again refused to accept Kurose's proposal, the effect of which would have been to end

Copy-Data's distribution to its dealers in the Northeast. (A. 145-49, 151-54.)

After receiving Copy-Data's financial statement in November, 1974, which indicated the expected financial problems (but which had not been "withheld," see infra), Kurose required Copy-Data to pay down its entire credit line. The BD-702s were due to arrive shortly, and by January, 1975 Copy-Data had paid the entire amount, including the $50,000 for the coated paper copiers it had taken as a "favor." (A. 157-58, 274-76, 771; E. 259-60.)

It is not "irrational" to conclude that the $50,000 special offer of coated paper copiers was a "trick," in view of (1) Kurose's contemporaneous effort to restrict Copy-Data to New Jersey and thereby to permit Toshiba to take over, as it had in the Middle Atlantic States, sales to Copy-Data's remaining dealers; (2) Kurose's purported concern over Copy-Data's financial status long before September, 1974, while it was Kurose who promoted the $50,000 special deal for Copy-Data in September, 1974, within two months of the arrival of the BD-702; (3) the fact that there were other creditworthy channels through which $50,000 in coated paper copiers could have been distributed by Kurose; (4) the fact that Kurose not only demanded the full payment of the $125,000 credit line, but

also the $50,000 special arrangement within two months after it was offered and after Winston had told Toshiba that he was concerned that that arrangement would interfere with Copy-Data's purchases of the plain paper copier (A. 157-58, 274-76, 771); (5) Kurose's special treatment of Toshiba's Southeastern distributor, Eiberger (ADBE), which owed Toshiba $500,000 (A. 776-77, 786)*; and (6) the fact that plaintiffs' other suppliers, including Royal Business Machines and Dennison, to which Copy-Data had given much less business than Toshiba, each continued Copy-Data's credit lines of $50,000 to $60,000. (A. 1289.)

It is fair to conclude that Kurose wished to increase Copy-Data's indebtedness immediately prior to the arrival of the plain paper copiers. Kurose anticipated that he would soon be in a position to demand the payment of not only the $125,000 credit line, but also the $50,000 special arrangement he promoted just before the new equipment was to become available. Kurose undoubtedly believed (or hoped) that this action would impair Copy-Data's ability to purchase the plain paper copier and distribute that copier to its dealers in the Northeast, which Kurose was prepared to handle with one employee (Copy-Data's dealers were

* See Plaintiffs' Br., pp. 42-43.

already established), thus eliminating the distributor discount on all sales to Copy-Data's dealers and thereby enhancing the profitability of his operation.*

This Court devoted substantial attention to the credit issue raised by Toshiba on appeal and concluded, as Toshiba lead it to, that "[p]lainly Copy-Data was deliberately withholding the [1974] financial statement from Toshiba in order to conceal its poor financial condition" (Slip Op. at 17). Copy-Data witnesses' testimony to the contrary was viewed by this Court as false and the District Court's finding as "irrational." It may be assumed that witnesses who would offer such blatantly false testimony were not worthy of belief and that a District Court which credited such testimony was truly "irrational" and capable, as Toshiba claimed, of "badly twisting the facts." This conclusion is mistaken.

Copy-Data witnesses testified truthfully that the statement had not deliberately been withheld and that it had not

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* In its brief (p. 33n) Copy-Data stated, however, that "since the damage issue depends upon the return policy with regard to the BD-702 . . . it is not necessary for this Court to address whether Toshiba's withdrawal of Copy-Data's line of credit in late 1974 was illegally motivated."

been received from Touche Ross (A. 216, 255-56), as the District Court correctly found (A. 1216), and as Toshiba knew as a result of its discovery in this case. Toshiba never presented testimony from Touche Ross. Toshiba did, however, take the deposition of Touche Ross (A. 5.), but it never sought to make use of that deposition or any Touche Ross witness, as might have been expected of a party seeking to prove the deliberate withholding of a Copy-Data statement prepared by Touche Ross and to thereby destroy the credibility of Copy-Data's witnesses and plaintiffs' counsel (as it did in this Court). Toshiba knew (but this Court did not know), that Toshiba's deposition of Touche Ross' partner in charge of the Copy-Data account and internal contemporaneous Touche Ross documents, subpoenaed by Toshiba, fully corroborated Copy-Data witnesses' testimony and the District Court's finding, and flatly contradicted Toshiba's claim of "deliberate withholding."*

* We recognize that, absent extraordinary circumstances, this Court will not consider evidence not part of the trial record. International Business Machines Corp. v. Edelstein, 526 F.2d 37, 45 (2d Cir. 1975). However, it is clear from this Court's Opinion that it was significantly influenced by its conclusion that Copy-Data deliberately withheld its financial statement and that Copy-Data's key witnesses did not tell the truth when they

(Footnote Continued)

(Footnote Continued)
testified at trial. This Court's decision to reverse the District Court's credibility determinations on other important issues necessarily was influenced by this belief. Since this Court's Opinion is demonstratively wrong on an issue which it believed to be of significant importance and which relates to the overall credibility of plaintiffs' case, we request that this be considered an "extraordinary" circumstance and that the following evidence obtained from Touche Ross be considered in the interest of justice and in order to correct the Court's Opinion which is in error:

1. An internal Touche Ross document dated September 8, 1974 and written by the Touche Ross partner in charge of the Copy-Data account and identified by that partner at his deposition, states in relevant part:

> Due to the tightness of the company's [Copy-Data's] working capital position management has decided to discontinue any further placements of machines on a rental or per copy basis. The company appears to have sufficient capital and net worth not to require a going concern comment in our opinion.

2. Above the date September 10, 1974 the following notation appears on an internal Touche Ross document entitled Copy-Data Systems 6.30.74 Draft of Report Reviewed with Client:

> The draft of the report was reviewed with the President and executive VP from the client and they agree with the format of the report. (Fn. Cont'd)

This Court was seriously misled to the conclusion that "plainly" Copy-Data was "deliberately withholding" its 1974 financial statement. Toshiba succeeded in convincing this Court that not only were Copy-Data's key witnesses untruthful, but that the District Court "sought to color the outcome of the case by badly twisting the facts of record" (Toshiba Br., p. 10).

(Footnote Continued)

3. However, above the dates October 28, 1974 and October 30, 1974 there appears the following:

> Additional Memo
> The above report was again reviewed with the client with the disclaimer of opinion.

(Emphasis supplied.)

Toshiba had these documents and knew that Copy-Data had approved the original draft statement and that thereafter Touche Ross decided to change its position and add a "disclaimer of opinion" which was reviewed on either October 28, 1974 or October 30, 1974 with Copy-Data. This statement was filed with the SEC on November 7, 1974 and given to Toshiba in mid-November, 1974. This Court has been seriously misled as this Court's Opinion indicates, and its Opinion is incorrect on an issue which it found of substantial importance. The District Court's finding is demonstratively correct and Copy-Data's witnesses' testimony should have been believed on this and other issues. In the interest of justice and in view of "extraordinary" circumstances, we request permission to provide this evidence to the Court.

On March 20, 1975, Baltimore counsel, retained by Copy-Data, instituted this suit. It insured Copy-Data a continued supply of the new plain paper copiers and its right to continue to market to its dealers in the Northeast (and not only in New Jersey) (A. 1, E. 259-60, 452-58). It was apparent that Copy-Data's opportunity for commercial success depended upon its ability to retain its remaining dealers.*

Copy-Data paid Toshiba a total of approximately $400,000 in cash for the BD-702s. (E. 446-458.) Within a short period of time after sales of the BD-702s began, significant machine problems developed. (A. 424, 460-61, 659-60, 984-85, 1315-16, 1643, 1644-49.) Copy-Data brought to the attention of Sidney Reisch, Toshiba's National Sales Manager (who took over the Copy-Data account upon Johnston's April, 1975 departure; A. 496, 773) the problems it was experiencing. (A. 310-11, 473-74, 1319-20.) As Reisch admitted on cross-examine

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* Baltimore counsel were retained by Copy-Data in view of their experience in distribution practices in the office equipment industry. See Advance Business Systems & Supply Co. v. SCM Corp., 287 F.Supp. 143 (D. Md. 1968), aff'd 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970); see also Eiberger v. Sony Corporation, 459 F.Supp. 1276 (S.D.N.Y. 1978), affirmed as to liability and modified as to damages, 622 F.2d 1068 (2d Cir. 1980). This

(Footnote Continued)

at trial:

> Q. When Mr. Winston called you and told you your equipment was not working -- he called you and told you he was having trouble with the BD-702?
>
> A. Yes, sir.
>
> Q. And you told him it was key operator problem?
>
> A. I told him that it could well be, based on our experience that most of the problems would be overcome by proper key operator training. (A. 542.)

Documents relied upon by this Court (Slip Op. p. 18) indicate that Copy-Data and Copy-Data's counsel accepted Toshiba's representations through the summer of 1975. Copy-Data sought to resolve the equipment problems which were believed to be, as Reisch advised, Copy-Data's or its dealers' faults. (E. 253, 269, 272.) It was not known in 1975 by Copy-Data or its counsel that Toshiba had

(Footnote Continued)
Court's Slip Opinion (p. 1) identifies Baltimore counsel as being from New York.

Since Toshiba filled Copy-Data's orders for the BD-702, the suit was initially not actively pursued. Only one deposition was taken by Copy-Data in 1975.

already taken back BD-702s from its other customers because they were not operating properly, that Toshiba was aware of the significant problems inherent in the equipment, or that Toshiba's "net" sales (sales minus returns) in the entire Middle Atlantic States in the last six months of 1975 amounted to but eight BD-702 copiers, demonstrating that the equipment was being returned to Toshiba (see infra). Toshiba misrepresented that the significant problems were attributable to Copy-Data.

Reisch's statement to Copy-Data that "most of the problems would be overcome by proper key operator training" (A. 542) was proved at trial to be false when made. It was established that the defects in the BD-702, which caused Toshiba to accept returns from its other customers, included a major problem in the developer section, frequent jamming in the heating unit, which fused the toner onto the paper causing scorched copies and fires, and skewed registration (A. 161-62, 272-73, 310-11, 424, 460-61, 473-74, 659-60, 782-83, 792-93, 984-85, 1315-16, 1319-20, 1644-49, 1681-84). At trial Toshiba's witness Johnston admitted on cross-examination:

> A. I never believed the 702 a good product, sir."

* * * *

Q. What was wrong with the 702?

A. . . . .If you want a dissertation on that subject, I will give you a good five or ten minute one, but there was a very significant problem that was bought to my attention by Hunt Chemical, the manufacturer of toners and developers for us.

* * * *

Q. The product worked initially, but after more and more copies were made, problems arose? That is what happened, isn't it?

A. That would be a fair statement, yes, sir. If you don't make copies, you are not going to find you have problems.

* * * *

Q. And the BD-702s came back?

A. Yes, sir. They needed to be modified.

(A. 782-83, 792-793; emphasis added.)

Sidney Reisch was asked on cross-examination whether Copy-Data sought to return BD-702s as they were returned to it from the field.* Reisch testified "I don't recall"

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* Credits totalling a $188,000 were issued by Copy-Data for BD-702s returned from the field (E. 438-444, 447; A. 1285-86, 1475-76, 1485) and $35,000-$40,000 in exchanges for other equipment was also provided by Copy-Data (A. 474). Machine returns to Copy-Data from the field numbered as follows: 78 BD-702s were returned

(Footnote Continued)

when asked whether Copy-Data requested that he accept the return of the equipment (A. 554-55). Copy-Data witnesses testified that they asked Reisch beginning in late 1975 to accept the equipment, that he told them that the problems were attributable to Copy-Data, and that he flatly refused to accept return of the copiers (A. 310-11, 473-74, 1320).*

Toshiba continued its misrepresentation concerning the BD-702 in a $2.75 million suit against Copy-Data and Harry inston in the United States District Court for the Southern District of New York (Metzner, J.) filed on June 24, 1976, immediately after Copy-Data's

(Footnote Continued)
once; 24 BD-702s were returned twice; 7 BD-702s were returned three times; 4 BD-702s were returned four times; 1 BD-702 was returned five times. (E. 438-444; A. 1475-76, 1485, 1285-86.)

* When Gordon asked to return the five BD-702s damaged in shipment by Toshiba to Copy-Data in early 1975, he first did so orally, which Gordon confirmed in writing. Gordon read the letter (E. 327) into the record:

> The first paragraph says, "In accordance with your request [Toshiba's request] I am confirming to you in writing the reasons for requesting to return the machines." (A. 1307, emphasis added; see also E. 329).

(Footnote Continued)

bankruptcy. It alleged that Copy-Data disparaged Toshiba by claiming that the BD-702 was defective (E. 433), and that:

> Dealers and customers who have been denied proper service from COPY-DATA and who as a consequence have received poor performance from Toshiba copy machines, are not aware that the deficiencies are due to improper service support from COPY-DATA but instead believe they are due to an inferior quality copier machine. (E. 431, emphasis added.)

Toshiba's suit also asserted that, as a result of Copy-Data's alleged wrongful failure to render proper service:

> TOSHIBA has suffered a reduction in sale volume of its copying machines, particularly its plain paper copier, in the Northeastern States since late 1974." (E. 432.)

(Footnote Continued)
Reisch admitted that Copy-Data complained that the BD-702 was not operating properly and that he attributed the problems, not to the BD-702, but to Copy-Data. (A. 542.) He did not ask Copy-Data to describe the problems in writing in order that the machines could be returned, nor did he offer any other assistance.

Toshiba's suit did not disclose that Toshiba had only net sales (sales minus returns) of eight BD-702s in the entire Middle Atlantic States for the last six months of 1975, since it was accepting returns of BD-702s from its dealers. (This is reflected in the confidential "Stipulation," Record Paper 56, Exhibit B thereto, admitted at trial. Toshiba refused to place this in the Appendix, even under seal.)*

The District Court properly concluded, not only upon the basis of Copy-Data's testimony, but also upon the testimony of Reisch and Toshiba's 1976 Complaint (E. 431, 432), that Copy-Data and Toshiba had discussions concerning the serious problems associated with the BD-702,

* Negative or zero net placements were realized by Toshiba in three of the last six months of 1975 in the entire region and net sales by Toshiba in the Middle Atlantic States of BD-702s in the last six months of 1975 totalled but eight machines (Stipulation, NR-56, Exhibit B, supra) -- unbeknownst to plaintiffs or their counsel until shortly before trial in 1978. Moreover, Toshiba, which was aware of its own experience in the Middle Atlantic States, claimed in its June, 1976 slander suit that "Toshiba has suffered a reduction in sale volume of its copying machines, particularly its plain paper copier, in the Northeast States since late 1974." (E. 432) This was claimed at a time when Toshiba knew that it had but eight net sales in the Middle Atlantic region in the last half of 1975 and that Copy-Data had purchased

(Footnote Continued)

and that Reisch had represented to Copy-Data that the significant problems with the equipment were attributable to Copy-Data while, at the same time (as Johnston admitted), the machines were already being accepted for return by Toshiba because "[t]hey needed to be modified." (A. 793.) The District Court properly found that Copy-Data asked to return the BD-702s and that Toshiba refused, claiming that the equipment problems were attributable to Copy-Data.

Reisch's misrepresentations to Copy-Data in 1975, even standing alone, constituted extreme bad faith, especially in view of Toshiba's know- ledge of Copy-Data's precarious financial condition. Toshiba recognized that the persistent BD-702 service problems experienced by Copy-Data were causing it significant reoccurring expense and that, in addition, Copy-Data had to accept copiers back from the field for credit, and other of Copy-Data's customers had refused to pay for defective equipment. BD-702s that were returned

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(Footnote Continued)
and paid for over 200 BD-702s for the Northeast, which were net sales for Toshiba because it would not accept the return of equipment from Copy-Data. Toshiba undoubtedly expected that the slander suit might discourage the prosecution of this case by the creditors of the estate of Copy-Data in bankruptcy.

to Copy-Data had to be refurbished and remarketed as used equipment, and then had to be repeatedly serviced in an effort to keep them from being returned, while Toshiba continued to represent that the problems were not due to the equipment but were Copy-Data's fault. Toshiba knew that the BD-702 problems were seriously affecting Copy-Data's cash flow and that if it refused assistance, Copy-Data would eventually succumb. Finally, Toshiba's refusal to accept the return of BD-702s prevented Copy-Data from purchasing merchantable copiers available from other manufacturers. (A. 1435, 920, 1281-85.)

The District Court properly concluded that Toshiba's conduct amounted to "commercial immorality" (A. 1744). Toshiba pushed Copy-Data towards bankruptcy because Winston had refused to relinquish to Kurose what he believed to be a significant opportunity for Copy-Data to become profitable -- that of selling the new plain paper copier to Copy-Data's remaining dealers in the Northeast. The District Court's findings with regard to the BD-702 (FF 20, 22; A. 1217-18) were correct.

III. As A Matter Of Law, Copy-Data Fulfilled Its Obligation With Respect To The Return Of Defective BD-702 Copiers

This Court concluded its discussion by stating "even assuming [Copy-Data's] testimony

regarding its requests to return defective BD-702 copiers] to be true, there is nothing wrongful in Toshiba's refusal to respond to oral requests of such generality." (Slip. Op. p. 18.)

In its appeal brief Copy-Data cited authority for the principle that Copy-Data had acted reasonably and fulfilled its responsibility when it notified Reisch that the copiers were not working (as Reisch admitted), asked him to accept their return (which Resich could "not recall"), and where Reisch and Toshiba continued to place the responsibility for the BD-702 problems squarely on Copy-Data. The law did not require Copy-Data to set forth in writing why the BD-702s were not operating (Toshiba knew, as Johnston admitted) and to ask again for their return, especially after Toshiba placed the responsibility for the problems upon Copy-Data. (See Plaintiffs' Br., p. 55n.)

IV. Conclusion

In recognition of the function of appellate review and of the demonstrably incorrect factual conclusions reached by this Court on significant issues of credibility, we

request that this Court's Opinion be reconsidered.

Dated: March 1, 1985 Respectfully submitted,

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APPENDIX G

STATUTES INVOLVED

Federal Rule of Civil Procedure 52 states in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally ad recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).